DOCKET

(10)

No. 88-1000-CSY
Status: GRANTED

Title: New York, Petitioner
v.
Bernard Harris

Docketed:
December 15, 1988

Court: Court of Appeals of New York

Counsel for petitioner: Johnson,Robert T., Coddington,Peter D.

Counsel for respondent: Harris,Bernard, Parker Jr.,Barrington D.

Entry	Date	Note	Proceedings and Orders
1	Dec 15 1988	G	Petition for writ of certiorari filed.
2	Jan 18 1989		DISTRIBUTED. February 17, 1989
3	Feb 16 1989	F	Response requested -- CJ, HAB.
4	Mar 22 1989		REDISTRIBUTED. April 14, 1989
5	Apr 17 1989		Petition GRANTED.
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6	May 1 1989		Record filed.
		*	Certified copy of original record received.
7	May 16 1989		Brief amicus curiae of Wayne County, MI filed.
8	May 18 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	May 18 1989		Brief of respondent Bernard Harris in opposition filed.
10	May 18 1989		(THE ABOVE MOTION TO PROCEED IFP AND BRIEF IN OPPOSITION WAS MAILED TO THE WRONG ADDRESS AND RECEIVED BY THIS OFFICE AFTER THE PETITION WAS GRANTED).
11	May 18 1989	D	Motion of respondent to dismiss writ as improvidently granted filed.
12	May 23 1989		DISTRIBUTED. June 8, 1989. (Motion of respondent for leave to proceed IFP, and motion of respondent to dismiss writ as improvidently granted).
14	May 30 1989		Order extending time to file brief of petitioner on the merits until June 22, 1989.
17	May 30 1989	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
15	Jun 12 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
16	Jun 12 1989		Motion of respondent to dismiss writ as improvidently granted DENIED.
19	Jun 22 1989		Brief amicus curiae of United States filed.
20	Jun 22 1989		Brief of petitioner New York filed.
18	Jun 26 1989		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
21	Aug 25 1989		Barrington D. Parker, Jr., Esquire, of New York, New York, a member of the Bar of this Court, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
22	Nov 13 1989		Brief amicus curiae of Barrington D. Parker, Jr. in support of judgment below filed.
25	Nov 22 1989		Joint appendix filed.
23	Nov 27 1989		SET FOR ARGUMENT WEDNESDAY, JANUARY 10, 1990. (2ND CASE)

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No. 88-1000-CSY

Entry	Date	Note	Proceedings and Orders
27	Nov 30 1989		CIRCULATED.
28	Dec 8 1989	X	Reply brief of petitioner New York filed.
29	Jan 10 1990		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1000

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

BERNARD HARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether the New York Court of Appeals erroneously construed the Fourth Amendment by holding that the warrantless arrest of a murder suspect in his home, although based on probable cause, by itself, requires the exclusion from evidence of his voluntary confession, given with full comprehension of the *Miranda* warnings about one hour later at a police precinct.

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IN THE

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OCTOBER TERM, 1988

No. ____

THE PEOPLE OF THE STATE OF NEW YORK,

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BERNARD HARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner respectfully prays for a writ of certiorari to review the judgment of the New York Court of Appeals entered in the above-captioned case on October 20, 1988.

OPINIONS BELOW

The opinion of the New York Court of Appeals, *People v. Harris*, ____ N.Y.2d ____ (1988), and the order of affirmance and opinions of the Supreme Court of the State of New York, Appellate Division, First Department, reported at 124 A.D.2d 472, 507 N.Y.S.2d 823 (1st Dept. 1986), are appended hereto as Appendix A.

JURISDICTION

The decision of the New York Court of Appeals was entered on October 20, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides, in part:

> Section 1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The following statement of facts is taken from the opinion of the New York Court of Appeals (Appendix A, pp.1a-3a).

On January 11, 1984 the police found the dead body of Thelma Staton in her apartment and investigation quickly developed probable cause to believe that defendant Bernard Harris was the killer. Five days later, on January 16, 1984, three police officers went to his apartment, without an arrest warrant, to take him to custody. The officers knocked on the apartment door but there was no response so one officer went down a fire escape to the window of the apartment, knocked on it, and said "Police". As he did so the officers at the front door, with badge displayed and guns drawn, knocked on the door again. Defendant opened the door and allowed the officers to enter, stating as he did so, one of the officers testified, that he was glad the police had come for him. The police then read defendant his *Miranda* rights. He acknowledged that he understood them and stated that he was willing to answer their questions. The officers told defendant that he was suspected of murdering Thelma Staton and the officers testified that after they did so defendant poured himself a glass of wine and then

admitted that he had killed the victim with a knife. He was arrested, taken to the station house where he was again given *Miranda* warnings, and made the written inculpatory statement to the police which was received at trial and is the subject of this appeal. Subsequently, defendant was given *Miranda* warnings a third time, just prior to the making of a videotaped interview with an assistant district attorney. However, this time when asked whether he wanted to speak about the death of Thelma Staton, defendant answered that he was tired and stated: "Well, I really don't know what to say right now," ". . . I have said all I can say." Nonetheless, a full statement was videotaped in which defendant again admitted that he had murdered Staton.

After a Huntley Hearing, Supreme Court suppressed the first statement, given in defendant's apartment, as the product of an illegal arrest and it suppressed the third videotaped statement given to the assistant district attorney, because it was taken after defendant had stated that he did not wish to be questioned further. It denied the motion to suppress the second statement finding the *Miranda* warnings had been repeated and defendant waived his rights before making the statement. The court's findings, undisturbed by the Appellate Division, included findings that the police had probable cause to arrest defendant at the time they entered his apartment, that they went there with the intention of making a warrantless arrest in his home and that defendant opened the door and permitted the police to enter because he was submitting to their authority. The trial court concluded that "no clearer violation" of *Payton v. New York* (455 U.S. 573) could be established.

Defendant was convicted after a bench trial and the judgment was affirmed by a divided Appellate Division.

The Decision of the New York Court of Appeals

In a 4-1-2 decision, the New York Court of Appeals reversed the order of the Appellate Division and ordered suppression of the admitted statement and a new trial. The majority's opinion, reasoning from *Payton v. New York*, 445 U.S. 573 (1980),

Brown v. Illinois, 422 U.S. 590 (1975), *Taylor v. Alabama*, 457 U.S. 687 (1982) and *United States v. Johnson*, 457 U.S. 537 (1982), found that the *Payton* violation, by itself alone, tainted the otherwise voluntary confession. "As a matter of policy, deterring *Payton* violations by suppressing confessions causally related to them is no less important than deterring investigative detentions or street arrests made on less than probable cause." (Appendix A p. 11a) The concurrer agreed with the majority in constraint of a prior holding of the court, but expressed "serious misgivings" about the unquestioning use of the *Brown v. Illinois* analysis in cases involving *Payton* violations. The two dissenters would have affirmed, reasoning that the defendant had decided to confess before the police arrived and hence that the confession was not "actively produced by any police illegality." The full texts of the opinions appear in Appendix A.

REASONS FOR GRANTING THE WRIT

POINT

THE DECISION BELOW THAT A *PAYTON* VIOLATION BY ITSELF REQUIRES THE SUPPRESSION OF AN OTHERWISE VOLUNTARY AND UNTAINTED CONFESSION RAISES AN IMPORTANT AND RECURRING QUESTION OF FOURTH AMENDMENT LAW WHICH THIS COURT HAS NEVER ANSWERED AND ON WHICH THE COURTS OF THE STATES HAVE SPLIT.

This petition presents the question which this Court found unnecessary to address in *United States v. Johnson*, 457 U.S. 537 (1982) because the government conceded the point. *United States v. Johnson*, *supra*, at p. 541 n.6. Here, in part relying on the erroneous supposition that this Court has passed on the question in *Johnson*, (Appendix A at pp. 10a-11a) the New York Court of Appeals concluded that, apparently without

exception, the Fourth Amendment* requires the suppression of an otherwise voluntary and untainted confession solely because the police, acting upon probable cause, arrested the suspect in his home.

This rationale and result is contrary to the law as announced by the Supreme Court of Arizona in *State v. Reffitt*, 145 Ariz. 452, 702 P.2d 681 (1985) *en banc*; by the Supreme Court of Georgia in *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981); and by the two highest courts in Florida that have considered this question, *Dixon v. State*, 451 So.2d 877 (Dist. Ct. of Apps. 2d Dist. 1984) *Pet. for rev. den.*, 458 So.2d 272 (Sup. Ct. Fla. 1984), *cert. denied*, 471 U.S. 1067 (1985), accord *State v. Thomas*, 405 So.2d 462 (Dist. Ct. of Apps. 3d Dist. 1981), *Pet. for rev. dsmd.*, 419 So.2d 1200 (Sup. Ct. Fla. 1982). It also conflicts with the rationale articulated by the Court of Appeals of Idaho in *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987).

The rationale and result reached by the New York Court of Appeals appears to conform with the views announced by the Court of Appeals of Arkansas in *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (Ct. App. 1984); by the Supreme

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* Although the New York Court of Appeals based its decision on the Fourth Amendment and the prior decisions of this Court, it also cited at one point Article I § 12 of the New York State Constitution. This single reference to the state constitution in an opinion which otherwise relied exclusively on Fourth Amendment jurisprudence cannot constitute an independent and adequate state ground which would preclude this Court from granting this petition. *See e.g. Michigan v. Chesternut*, 486 U.S. ___, 100 L.Ed.2d 565, 570 n.3, 108 S. Ct. 1975, 1978 n.3 (1988); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The conclusion that the New York Court of Appeals did not rest its decision here on state grounds is buttressed by the fact that when that court wishes to decide a case upon independent and adequate state grounds it expressly says so. *See e.g. O'Neill v. Oakgrove Construction*, 71 N.Y.2d 521, 524; 523 N.E.2d 277, 278; 528 N.Y.S.2d 1, 2 (1988); *Matter of Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 65-66; 510 N.E.2d 325, 328; 517 N.Y.S.2d 456, 459 (1987); *People v. Stith*, 69 N.Y.2d 313, 316 fn., 506 N.E.2d 911, 912; 514 N.Y.S.2d 201, 202 (1987).

Court of Iowa in *State v. Hatter*, 342 N.W.2d 851 (Iowa 1983); and by the Court of Criminal Appeals of Oklahoma in *Lowry v. State*, 729 P.2d 511 (Ct. Crim. App. Okla. 1986). The New York Court of Appeals view also conforms to the view of the Supreme Court of Appeals of West Virginia, although the West Virginia position appears to be independently grounded in state law as well as the Fourth Amendment. *See State v. Davis*, 294 S.E.2d 179 (Sup. Ct. App. W. Va. 1982), *State v. Mullins*, 355 S.E.2d 24 (Sup. Ct. App. W. Va. 1987), and *State v. Canby*, 162 W. Va. 666, 252 S.E.2d 164 (Sup. Ct. App. W. Va. 1979).

Thus, due to the pronounced differences in rationale and result that presently exist among the several states which have answered this fundamental question of Fourth Amendment jurisprudence, this Court should use this case as the vehicle to finally settle this important and recurring question. This record squarely presents the question which was fully litigated in all the state courts, and which, in the opinion of the State, was incorrectly decided by the New York Court of Appeals.

The State believes that where, as here, probable cause for the arrest existed, the holdings of *Brown v. Illinois*, *supra*, and *Dunaway v. New York*, 442 U.S. 200 (1979), do not apply. Since defendant's arrest would have been constitutional if effected elsewhere and his confession admissible (*cf. United States v. Watson*, 423 U.S. 411 [1976]), the mere fortuity that the police here misjudged the effect of defendant's apparent consent to their entry, should not operate to exclude extremely reliable evidence of guilt to the detriment of the legitimate interests of law enforcement. *Cf. Taylor v. Alabama*, 457 U.S. 687, 699-700 (1982) (O'Connor, J. dissenting); *Brown v. Illinois*, 422 U.S. 590, 610-12 (1975) (Powell, J. concurring). Here the facts resemble those addressed in *Rawlings v. Kentucky*, 448 U.S. 98, 107-10 (1980): the violation of the Fourth Amendment was "technical," the conduct of the police was not overbearing, and the confession was totally voluntary. Under these circumstances, the State believes the New York Court of Appeals erroneously invoked the exclusionary rule, and it requests that this Court issue a writ of certiorari to define the proper scope of the exclusionary rule as regards voluntary statements given after

Payton violations and to resolve the conflict among the states regarding this issue.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PAUL T. GENTILE
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Attorney for Petitioner

PETER D. CODDINGTON
Assistant District Attorney

Of Counsel

December 1988

APPENDIX

COURT OF APPEALS

STATE OF NEW YORK

1 No. 137

THE PEOPLE, & c.,

Respondent,

v.

BERNARD HARRIS,

Appellant.

Bernard Harris, Comstock, appellant *pro se*.

Paul Gentile, DA, Bronx County (Karen Swiger & Billie Manning of counsel) for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

SIMONS, J.

Defendant has been convicted after trial of murder second degree for the stabbing death of his former girlfriend. The evidence against him included a statement he made in the police station approximately an hour after the police arrested him in his apartment without a warrant. Defendant contends that the statement should have been suppressed because it was obtained in violation of constitutional guarantees against illegal searches and seizures (*see*, NY Const, art I, § 12; US Const, 4th Amend). The People contend that the entry and arrest were consensual but maintain that even if illegal under *Payton v New York* (445 US 573), the confession was admissible because it was sufficiently attenuated from the illegality. This is particu-

larly so, they claim, because at the time of the arrest the police were acting on probable cause. The Trial Court found the entry and arrest were not consensual and that finding, undisturbed by the Appellate Division, is binding on this Court. Accordingly, the issue before us is limited to whether the causal connection between the illegality and the confession was attenuated.

Ordinarily, questions of attenuation are mixed questions of law and fact that we may review only to ascertain whether there is support in the record for the determination of the lower courts (*see*, *People v Borges*, 69 NY2d 1031, 1035; *People v Conyers*, 68 NY2d 982, 984; *People v Bastidas*, 67 NY2d 1006, 1007). In this case however, we must look to the legal sufficiency of the evidence, particularly the weight to be attributed to probable cause in cases involving *Payton* violations. We conclude defendant's statement should have been suppressed on Fourth Amendment grounds and therefore reverse the order of the Appellate Division and order a new trial.

On January 11, 1984 the police found the dead body of Thelma Staton in her apartment and investigation quickly developed probable cause to believe that defendant Bernard Harris was the killer. Five days later, on January 16, 1984, three police officers went to his apartment, without an arrest warrant, to take him into custody. The officers knocked on the apartment door but there was no response so one officer went down a fire escape to the window of the apartment, knocked on it, and said "Police". As he did so the officers at the front door, with badge displayed and guns drawn, knocked on the door again. Defendant opened the door and allowed the officers to enter, stating as he did so, one of the officers testified, that he was glad the police had come for him. The police then read defendant his *Miranda* rights. He acknowledged that he understood them and stated that he was willing to answer their questions. The officers told defendant that he was suspected of murdering Thelma Staton and the officers testified that after they did so defendant poured himself a glass of wine and then admitted that he had killed the victim with a knife. He was arrested, taken to the station house where he was again given *Miranda* warnings, and made the written inculpatory statement to the police which was received at trial and is the subject of this

appeal. Subsequently, defendant was given *Miranda* warnings a third time, just prior to the making of a videotaped interview with an assistant district attorney. However, this time when asked whether he wanted to speak about the death of Thelma Staton, defendant answered that he was tired and stated: "Well, I really don't know what to say right now", ". . . I have said all I can say." Nonetheless, a full statement was videotaped in which defendant again admitted that he had murdered Staton.

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Defendant was convicted after a bench trial and the judgment was affirmed by a divided Appellate Division. Justice Sandler, with whom Justice Wallach concurred, agreed with the Supreme Court's determination that the police had made an illegal arrest but nevertheless found attenuation based upon the existence of probable cause. He also found that defendant gave his written statement at the station house not because he felt committed by what he had said at his apartment but because he had made a clear decision to admit his guilt prior to the illegal entry of the police.[1] The trial court made no such finding and

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1 The dissent relies on similar reasoning, but the weakness of the argument is demonstrated by contrasting it with *People v Emanuel* (295 NW2d

Justice Sandler cited no evidence in the record to support his conclusion.

Justice Asch, joined by Justice Kassal, concurred in affirmance in a separate writing. He found that defendant had consented to the police entry but held that, assuming a *Payton* violation, any "taint" resulting from the illegal arrest was removed by the lapse of time between the initial confession and the rereading of the *Miranda* warnings before defendant made his second confession.

Justice Rosenberger dissented and voted to reverse the judgment and remand the matter for a new trial. He concluded that there was no significant intervening event between the defendant's initial statement in his apartment, found by the hearing court to be the result of his unlawful arrest, and the written statement given at the police station.

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875 [Mich App]). In *Emanuel*, the People introduced evidence that before his illegal arrest defendant had voluntarily told two police officers that he had information about the crime. The officers told him to go to the police station and report it but when he did not appear, two other officers sought him out and asked to talk with him. Defendant's first words on meeting them were that he had "intended" to talk to them. Under these circumstances, the Court could hardly be faulted for taking defendant's words at face value. The proof of intent in *Emanuel* is far different from the police officers' testimony concerning defendant's statements in this case. In *Emanuel* there was evidence of antecedent circumstances, i.e., events transpiring prior to the illegal arrest, as well as defendant's unambiguous statement when the police arrived. The only evidence supporting voluntariness in the present case is the testimony of police officers who conducted the illegal arrest and there is no indication that the Trial Court accepted it. Indeed, the Court explicitly found that defendant's actions were in submission to the authority of two police officers at the front door, displaying a badge and with guns drawn, and a third at the window of his apartment.

In response to the dissent's statement that the courts "apparently" held the entry into defendant's home was not consensual, the Trial Court found, and its findings were undisturbed by the Appellate Division, that "no clearer violation" of *Payton* could be established. Nor were the police present to "investigate". The Trial Court found that the police went to defendant's apartment to make a warrantless arrest and labeled the claim that they were only there to investigate "nonsense". Thus, the dissent, while rejecting the *Brown* test for measuring the taint, relies on a "sensitive assessment" of facts, as it finds them, which are contrary to the findings of the courts below.

In *Payton v New York* (445 US 573, *supra*), the Supreme Court held that arrest was a species of seizure and that a warrantless, non-consensual entry into a suspect's home to make a routine felony arrest violates the Fourth Amendment. It noted that the Fourth Amendment protects individual privacy in a number of settings and stated that in none of them is the zone of privacy more clearly defined than in "the unambiguous physical dimension of the individual's home" (445 US at 589). Accordingly, it held that the fruits of illegal entries must be suppressed even though the police might have probable cause to conduct a search or effectuate an arrest outside the home without a warrant. Under the rule of *Payton*, this arrest was clearly illegal, as the courts below found, and it only remains to determine the consequences of the illegal police conduct.

In *Wong Sun v United States* (371 US 471), the Supreme Court first considered whether a confession, otherwise admissible, must be suppressed if it is the "fruit" of an antecedent illegal arrest. The Court held that verbal evidence "which derives so immediately from an unlawful entry and an unauthorized arrest . . ." is no less the product of official illegality than the more common physical, tangible evidence obtained as a direct result of an unlawful invasion. Therefore, the exclusionary rule operates to bar from trial any verbal statements obtained as a direct result of an unlawful invasion (*id.* at 485). In *Brown v Illinois* (422 US 590), the Supreme Court clarified the *Wong Sun* decision and addressed the proper effect that should be given to *Miranda* warnings administered after an illegal arrest.

In *Brown*, defendant was unlawfully arrested and taken to a police station where some two hours later, after being given proper *Miranda* warnings, he made the incriminating statements used against him at trial. Justice Blackmun, speaking for the Court, noted the Fourth and Fifth Amendment concerns in the case and stated that for the causal chain between the illegal arrest and the subsequent statements to be broken *Wong Sun* requires not merely that the statement meet the Fifth Amendment's standards but also requires "consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment" (*id.* at 601-602). The Court reasoned that if *Miranda* warnings, by themselves, were sufficient

to attenuate the taint of an unconstitutional arrest, any incentive to avoid Fourth Amendment violations would be substantially impaired and the exclusionary rule diluted. Thus, the Court held that *Miranda* warnings in and of themselves do not purge the taint of the original illegality. The Court rejected a "but for" standard that would require suppression of all statements made after police illegality, however, and held that the question of whether a confession is the product of a free will under *Wong Sun* must be answered by reviewing the facts of each case. Three of the factors to be considered, the Court said, are the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. The fact that the statement was freely made after the proper reading of *Miranda* warnings is necessary for the purposes of the Fifth Amendment, but this type of "voluntariness" is merely a threshold requirement in Fourth Amendment analysis for "if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached" (*id.* at 603-604).

In the present case, defendant was given *Miranda* warnings and freely gave his statements at the apartment and at the police station and thus the Fifth Amendment threshold requirement has been satisfied. But because defendant was illegally arrested in his home, the court must determine, by applying the factors delineated in *Brown*, whether the statement given in the police station was sufficiently purged of the taint of this Fourth Amendment *Payton* violation or the causal connection between the illegality and the confession remains. The trial court's conclusion of attenuation rested on its finding that *Miranda* warnings had been repeated before the statement was made. The two opinions for affirmance in the Appellate Division based their finding of attenuation on the repetition of the *Miranda* warnings, the lapse of time between the arrest and the station house statement and the benign nature of the police conduct because of the existence of probable cause. The courts below did not identify any intervening event, other than the *Miranda* warnings, between the arrest and the making of the statement at the police station.

Considering first temporal proximity, defendant's written statement was given approximately one hour after the illegal arrest, a considerably shorter period than the time which elapsed between the illegal arrest and the suppressed statement in *Brown v Illinois* (*supra*). The People argue that the shortness of the interval between the arrest and the statement in the police station and the officers' testimony concerning defendant's conduct in the apartment indicates the confession was an act of free will formed before the police entry. It can be argued with equal force that the statement was given by defendant in submission to the authority of the police who had illegally entered his home and arrested him. In short, the temporal relationship between the illegal arrest and the statement is, at best, ambiguous. Standing alone, it cannot serve to attenuate the illegality and it becomes important to look for events occurring within the interval between arrest and confession (*see*, *Dunaway v New York*, 442 US 200, 220 [Stevens, J., concurring]).

In this case, the short time period and the continuous police presence with defendant from the time he was arrested until the time he gave his statement, without any legally significant intervening event, indicate that the station house statement was no less a product of the Fourth Amendment violation than was the statement defendant made in his apartment which the courts below suppressed. Reading defendant his *Miranda* rights again may have cured the Fifth Amendment violation but, as *Brown v Illinois* held, standing alone it could not attenuate the link between the Fourth Amendment violation and the statement. Having just given a statement in his apartment which inculpated him in the crime, defendant had already committed himself and "there was little incentive to withhold a repetition of it" (*United States v Johnson*, 626 F2d 753, 759, *affd* 457 US 537). Thus, there is no evidence relating to the first two *Brown* factors which would break the link between the illegal arrest and the incriminating statement.

Nor does a consideration of the third factor, the purpose and flagrancy of the official misconduct, support a finding of attenuation. Not all evidence connected with police misconduct must be excluded. The principal purpose of the rule is deterrence and at some point the consequences of the police illegality become

so diminished that the remedy of exclusion no longer justifies its cost (*see*, *Brown v Illinois*, 422 US 590 [Powell, J., concurring]). The acquisition of the evidence may be so remote from the illegal conduct and the causal relationship so attenuated that suppression of the evidence would exact a far too heavy price. It is necessary, however, to extend the "taint" doctrine far enough to serve the purposes of deterrence and thus the purpose and flagrancy of the police conduct become a legitimate and important factor in the equation. If the impetus for the illegality has been a purposeful violation of the Fourth Amendment more is required to attenuate the causal chain between it and the confession. But it should be noted that the converse is not true. An otherwise inadmissible confession may not be admitted into evidence simply because there has been no showing of purposeful misconduct. Misconduct is a factor, not a controlling factor, and while the severity of the police illegality may fortify a finding that strong deterrence is required, attenuation is not established by showing that the police conduct was undertaken in good faith (*Taylor v Alabama*, 457 US 687; *see generally*, La Fave, 4 Search and Seizure, § 11.4[b], pp 397-398).

In the case before us, the trial court found the police went to defendant's apartment to arrest him and, as the police conceded, if defendant refused to talk to them there they intended to take him into custody for questioning. Nevertheless, they made no attempt to obtain a warrant although five days had elapsed between the killing and the arrest and they had developed evidence of probable cause early in their investigation. Indeed, one of the officers testified that it was department policy not to get warrants before making arrests in the home. From this statement a reasonable inference can be drawn, as the dissent below did, that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession (*see*, 124 AD2d 472, 478). Thus, the police illegality was knowing and intentional, in the language of *Brown* it "had a quality of purposefulness", and the linkage between the illegality and the confession is clearly established. Moreover, these illegal efforts continued after defendant's detention because the assistant district attorney subsequently obtained a third statement from him unlawfully.

The analysis highlights the distinction between this case and cases such as *People v Conyers* (68 NY2d 982) and *Rawlings v Kentucky* (448 US 98) on which the People and the dissent rely. In *Conyers* the arrest was not only free of flagrant and purposeful misconduct, it was legal when made. Given the appropriateness of police conduct at the time and the fact that defendant's statement was made after he had been left alone for two hours, we affirmed the Appellate Division's factual finding of attenuation. In *Rawlings* defendant was detained for 45 minutes while two police officers went to obtain a warrant. The Supreme Court cautioned that under strict custodial conditions such a short lapse of time might not purge the taint of an illegal arrest. However, in the case before it the Court denied suppression because the arrest was made in the "congenial" atmosphere of defendant's home and his statement was made "spontaneously", to avoid implicating a friend in the crime (*id.* 108-109). The dissent also relies on *People v Rogers* (52 NY2d 527, *cert denied* 459 US 898) and the Appellate Division's decision in *People v Matos* (93 AD2d 772). Both cases involve situations in which defendant was confronted with incriminating evidence independently obtained and the courts held that the intervening events broke the causal chain between the illegality and confession. The *Rogers* case is also distinguishable because of the elapsed time, the nature of the police conduct, and the additional intervening factor that defendant had talked with his brother during his three hour detention. In the case before us, the police deliberately made an illegal arrest, according to the practice of the department, to obtain a confession of defendant. None of the courts below found any intervening event sufficient to attenuate that illegality, nor do we.

Two Justices of the Appellate Division distinguished this case because the police had probable cause to arrest the defendant. They reasoned that the defendant's arrest could have taken place lawfully anywhere except in his apartment and that this "major difference in the character of the underlying illegality" supported a determination that there had been sufficient attenuation to purge the primary taint of the illegal arrest. Judge

Titone's concurring opinion states the distinction intended, that the wrong in *Payton* cases such as this lies not in the arrest, "but in the unlawful entry into a dwelling without proper judicial authorization".[2] The argument is contrary to the express language of *Payton's* holding that "a basic principle of Fourth Amendment law [is] that searches and seizures inside a home without a warrant are presumptively unreasonable" notwithstanding probable cause (445 US 573) and we implicitly rejected it in *Conyers*. Indeed, we applied that interpretation earlier in *Riddick v New York* (445 US 573), the companion case of *People v Payton*. In *Riddick*, the police made a warrantless felony arrest based upon probable cause in defendant's apartment and, as an incident of that arrest, seized tangible evidence. Upon remand from the Supreme Court, we suppressed the evidence without comment and ordered a new trial (*People v Riddick*, 51 NY2d 764; *cf. People v Payton*, 51 NY2d 169 [remitted for a new hearing on exigent circumstances]). Had the arrest been legal we would have held the evidence properly obtained as incident to a legal arrest or remitted for a determination on the question. Implicit in our decision was a holding that because of the illegal entry, and notwithstanding probable cause for the arrest, the evidence was illegally acquired.

Indeed, the issue is no longer open for discussion. *United States v Johnson* (626 F2d 753, *affd* 457 US 537, *supra*), presented factual circumstances almost identical to the present appeal. The police had entered defendant's apartment and arrested him without a warrant although they possessed probable cause. He confessed at the apartment and again at the police station. The Circuit Court of Appeals, applying *Payton*, held the arrest was illegal and, after applying the rule in *Brown v Illinois* (*supra*), it suppressed both confessions. On appeal to the Supreme Court, the People argued that the statements should

2 This view has been accepted by some courts (*see, State v Thomas*, 405 So2d 462 [Fla App]; *Thompson v State*, 285 SE2d 685[Ga]). The effort to separate the two events and hold that the confession need not be suppressed because the arrest is legal and has been described by a prominent authority as a "gross misapplication" of the inevitable discovery rule rule (*see*, La Fave, 4 Search and Seizure, § 11.4[b], p 397).

[Sic in the uncorrected slip opinion]

not be suppressed because the rule in *Payton* should not be applied retroactively. The Supreme Court, without questioning the application of *Payton* by the Circuit Court, affirmed its determination that the arrest was illegal and that the confessions must be suppressed. That holding controls here.

As a matter of policy, deterring *Payton* violations by suppressing confessions causally related to them is no less important than deterring investigative detentions or street arrests made on less than probable cause.[3] All are entitled to the same level of scrutiny and evidence obtained as a result of such misconduct must be suppressed unless the taint of the illegality has become sufficiently attenuated.

Accordingly, the order of the Appellate Division should be reversed, defendant's statement suppressed and a new trial ordered.

TITONE, J. (concurring):

I concur in the majority's result and reasoning on constraint of our recent decision in *People v Conyers* (68 NY2d 982). In that case, the Court, for the first time and without further discussion, utilized the factors delineated in *Brown v Illinois* (422 US 590; *see, also, Rawlings v Kentucky*, 448 US 98) to determine whether statements made by a defendant arrested in violation of the rule enunciated in *Payton v New York* (445 US 573) were sufficiently attenuated from the "illegality" to permit their admission into evidence. Despite my concurrence, here and in *Conyers* (*supra*), I continue to have serious misgivings

3 As to the dissent's argument that deterrence is not required in *Payton* cases because the police will not make warrantless arrests at the home and risk having confessions suppressed, the simple answer is that they did so here and apparently do so routinely in this Police Department.

As to the dissent's argument that the majority is suppressing because there was probable cause, the position of the majority is that suppression is required because there was an illegal arrest, notwithstanding probable cause, and the causal relationship between the illegality and the evidence obtained was not attenuated.

about the unquestioning use of the *Brown* analysis in cases involving *Payton* violations.[1]

As a threshold matter, before attenuation is considered, the courts must first determine whether "the challenged evidence is in some sense the product of illegal governmental activity" (*United States v Crews*, 445 US 463, 471). In cases such as *Brown v Illinois* (*supra*) and its progeny, an affirmative answer to that preliminary question may be assumed, since the "illegality" is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement. In these cases, the "challenged evidence"—i.e., the post-arrest confession—is unquestionably "the product of [the] illegal government activity"—i.e., the wrongful detention. In cases involving *Payton* violations, in contrast, the initial causal relationship between the illegality and the subsequently obtained statement is more dubious. Unlike in *Brown* (*supra*), it is not the detention itself that is wrongful, but rather the manner in which the arrest was carried out. Although we sometimes use legal shorthand and refer to the police action as an "illegal arrest," the true wrong in *Payton* cases lies not in the arrest but in the unlawful *entry* into a dwelling without proper judicial authorization.[2]

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1 Contrary to the majority's assertion and the views of one commentator (*see*, slip op, at 15, n2), the misgivings I express here are far more substantial than a simple "misapplication" of the "inevitable discovery doctrine."

2 The precise holding of the Supreme Court in *Payton* was not that the arrest per se was unlawful, but rather that an otherwise improper warrantless entry into the home cannot be justified by the sovereign's common-law right to effect an arrest without a warrant, even when the arrest is supported by probable cause. This reading of *Payton* is evident both from Justice Stevens' characterization of the question presented (*supra*, at 574, ["the constitutionality of • • • statutes that authorize police officers to enter a private residence without a warrant • • • to make a routine felony arrest"]) and from the Court's rationale (*id.*, at 589-590):

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. • • • In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The language quoted by the majority—that " 'a basic principle of Fourth Amendment law [is] that searches and seizures *inside a home* without a warrant are presumptively unreasonable' " (slip op, at 15, quoting *Payton v New York*, *supra* [emphasis supplied]—is certainly not to the contrary.

Whether there is a sufficient causal relationship between this unlawful *entry* and the police's subsequent obtaining of a statement is a matter that should be explored before the court embarks on the more traditional attenuation inquiry (*Crews v United States*, *supra*).[3] It was apparently this missing step that troubled Justice Sandler at the Appellate Division (*see*, 124 AD2d 472 [Sandler, J., concurring]). In my view, the absence of guidance from this Court on the issue will continue to lead to analytical problems in future *Payton* cases.

WACHTLER, Ch. J. (Dissenting):

There is no sound basis in law or public policy—indeed it would seem to be against public policy—for this Court to suppress a confession which was wholly the product of a defendant's free will, unaffected by any police illegality. The

3 In *People v Riddick* (51 NY2d 764), we ordered suppression of physical evidence found in a dresser drawer while the police were unlawfully on the premises without a warrant. In that case, there was a logical causative relationship between the unlawful entry and the discovery of the physical evidence on the premises. Thus, *Riddick* is not inconsistent with the view that it is the warrantless entry, and not the arrest, that *Payton* proscribes. In contrast, there is no such logical causative relationship where, as here, the evidence to be suppressed is a confession made at the police station after the in-home arrest has been completed. Further, contrary to the majority's suggestion (slip op, at 16), the Supreme Court's holding in *United States v Johnson* (457 US 537) is not controlling because there is no indication that the Court, which was concerned with the retroactivity issue, even considered the attenuation problem that the case presented (*see*, *People v Ford*, 62 NY2d 275, 281 n•).

majority does so in this case, ostensibly because the application of factors found relevant in *Brown v Illinois* (422 US 590), indicate that a second confession was not sufficiently attenuated from a prior confession. Nowhere, however, in the majority opinion, or in the Appellate Division concurring opinions, or in the trial court opinion, are there any facts from which it can be reasonably inferred that either the first confession or the second confession was the product of anything other than defendant's independent and self-motivated decision to confess to killing his girlfriend. I do not believe that the majority's purported establishment of a connection, in the abstract, between two completely voluntary confessions provides a basis for suppression here.

The facts are unusual but uncomplicated. Defendant's girlfriend, Thelma Staton, was killed when her throat was cut with a knife. The police, with probable cause to believe that defendant did the killing, but without an arrest warrant, went to question defendant at his home. The police knocked at the door, and, after some delay, defendant came to the door and asked "who is it." A detective held his badge up to the peephole, and defendant then opened the door, stating "I'm glad you came for me." Defendant was then read the *Miranda* warnings, which he acknowledged that he understood. He then invited the police officers to sit down, and said that he was going to fix himself a glass of wine. One detective then sat down, and told defendant that he wanted to talk to him about the death of Thelma Staton. After pouring the wine, defendant stated that he loved Thelma Staton, but that she was not bringing up her child "right," and that he had killed Thelma Staton by cutting her throat with a knife.

Defendant was then arrested and taken to the police station. The *Miranda* warnings were again read to him, and he indicated that he understood them. Defendant then dictated a confession to a police officer, who wrote it down as defendant spoke. When the confession was completed, defendant read it, and made one change by crossing out a section which stated that he had taken the murder weapon with him after the crime. This was changed to read that defendant had thrown the knife out of

the window immediately after killing the victim. After this change was made, defendant signed the confession.

These facts were found by the trial court, were undisturbed by the Appellate Division, and, finding support in record, now bind this Court.

On these facts, the two lower courts found a *Payton* violation, apparently holding that defendant did not sufficiently consent to the entry of the police into his home (*see*, *Payton v New York*, 445 US 573). I agree with the concurrers at the Appellate Division that this conclusion is questionable. Indeed, although the trial court did, as the majority notes, denominate the *Payton* issue "clear", it nevertheless appears that the lower courts did not come to grips with the potentially dispositive issue of consent. But, even if there was no consent, and thus a *Payton* violation, I am at a loss to understand what legal principle necessitates suppression of the defendant's confessions.

Initially, I note that this question is reviewable by us. Both lower courts held without analysis that the first confession was suppressible. However, simply put, when using the correct legal standard together with the facts found by those courts this conclusion is without basis (Cohen and Karger, Powers of the New York Court of Appeals, §§ 114, 115). Indeed, the majority exercises its power to review the suppression of the second confession on this very basis.

I

The fundamental principle here, repeated by the United States Supreme Court and this Court so often as to be axiomatic, is that "it has never been enough to show that evidence must be suppressed simply because it is discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements" (*People v Rogers*, 52 NY2d 527, 535, *cert. denied* 459 US 898; *see*, *People v Conyers*, 68 NY2d 982, 983; *People v Arnau*, 48 NY2d 27, 32; *Rawlings v Kentucky*, 448 US 98; *Brown v Illinois*, 422 US 590). We have consistently rejected, and should

reject again today, the notion that "a person illegally detained be forever granted immunity from conviction" (*People v Rogers, supra* at 531). Instead, our judgment should be anchored upon the settled rule that defendant's statements may be admissible against him at trial provided that the statements "were acts of free will unaffected by any illegality in the initial detention" (*Rawlings v Kentucky, supra* at 110).

Applying these principles in *Brown v Illinois* (*supra* at 603), the Supreme Court held that when an illegal arrest has been followed by a confession, the question becomes whether the confession was actively produced by the arrest, or by some independent force. In *Brown* the court stated that relevant factors to analyze this question were the presence of *Miranda* warnings, temporal proximity of the arrest and confession, intervening circumstances, and the flagrancy of police misconduct (*id.*, at 603-604). But these are only factors, none of which is dispositive, to be used as tools to assess the independence of a confession from any police illegality; mathematical summation of values accorded to each factor is no substitute for sensitive assessment of the facts of each case, and the reaching of a well founded conclusion whether a police illegality actively caused a confession.

The case law bears this out; where it is clear that a confession is the product of a force independent from an allegedly unlawful detention, the confession is admissible. For example, in *People v Rogers* (*supra*), a confession caused by defendant being confronted with legally obtained evidence was admissible; in *Rawlings v Kentucky* (*supra*), a confession caused by the police discovering physical evidence in a purse was admissible; and in *People v Matos* (93 AD2d 772), the defendant's statements caused by the knowledge that his girlfriend told the police "about the rape" were admissible.

Similarly, on the facts in this record, defendant's confessions manifestly were not the product of a *Payton* violation. Defendant was expecting the arrival of the police, as shown by his reaction that he was "glad" when they got there. Nor can it reasonably be inferred that defendant was feeling any police coercion as he fixed himself a glass of wine to make himself more comfortable, and then explained how he had both loved

his girlfriend and killed her. These are not the statements and actions of a man reacting to police coercion or illegality; on the contrary, these facts portray a man who quite independently had decided to confess before the police arrived, and whose decision, therefore, was formed independently from any illegal police conduct. As a result, neither the first confession, nor the second confession which followed, were in any way actively produced by any police illegality.

Thus the case law does not require suppression here. My disagreement with the majority, however, goes beyond this. I take issue with the assertion that deterrence of *Payton* violations requires suppression in this case; indeed, I believe that suppressing this defendant's freely and independently given confessions will, in net effect, encourage police conduct posing greater threats than are presented in this case.

As to the deterrence argument: the majority asserts that if we do not suppress here we will encourage *Payton* violations. In reality, however, use of defendant's confessions will not have this effect. Here the defendant welcomed the police, sipped wine and confessed. If we did not suppress here the rule would remain, as it has long been, that there will be suppression if the confession is actively produced by police illegality. Given this fact, the deterrence benefit furthered by this case eludes me. Armed with probable cause to arrest a suspected murderer, surely the police will not forego obtaining a warrant with hopes of meeting a congenial host, and thereby circumventing *Brown v Illinois*. Nor should we be worried that the police will choose to run the risk that, if this oddity does not occur, the whole police investigation will be jeopardized, including not only confessions obtained, but all physical evidence discovered as well.

Even more distressing, this decision will encourage more intrusive and dangerous police conduct than that which the majority erroneously believes it needs to deter. The majority suppresses here not on the usual grounds of the lack of probable cause, but, ironically, because there *was* probable cause. The majority's rationale turns directly on that finding: it reasons that because there was probable cause there should have been a warrant, but because there was no warrant, suppression is required.

But what is missed here is that if the police had been conducting a routine investigation, without probable cause, defendant's confessions would be admissible. Thus in the name of deterrence, for the sake of suppressing a manifestly independent confession, the majority encourages the questioning of suspects before probable cause is obtained.

Where deterrence is unnecessary, and where defendant's confessions were not the product of police illegality, there should be no suppression. I therefore dissent.

* * * *

Order reversed, defendant's statement suppressed, and a new trial ordered. Opinion by Judge Simons in which Judges Kaye, Alexander, Titone and Hancock concur, Judge Titone in a separate opinion. Chief Judge Wachtler dissents and votes to affirm in an opinion in which Judge Bellacosa concurs.

Decided October 20, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Opinions and Order, Dated November 6, 1986

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BERNARD HARRIS, Appellant.—Judgment, Supreme Court, Bronx County (Irving Lang, *J.*), rendered on April 29, 1985, affirmed. Sandler, *J. P.*, concurs in a memorandum with which Wallach, *J.*, concurs; Asch, *J.*, concurs in a separate memorandum with which Kassal, *J.*, concurs; and Rosenberger, *J.*, dissents in a memorandum, all as follows:

SANDLER, *J. P.* (concurring).

It may be that the somewhat ambiguous hearing testimony would have supported a factual finding by the hearing court that the defendant was arrested under circumstances that did not violate *Payton v New York* (445 US 573). I am unable to agree, however, that the hearing court's finding that such a violation occurred was erroneous as a matter of law or contrary to the weight of the evidence. Accordingly, the critical issue, in my view, is whether there was an adequate basis for the hearing court's further determination that there had been sufficient attenuation to justify the acceptance into evidence of the defendant's written station house statement given after a renewal of the *Miranda* rights.

Although the issue is a close one, and the dissenting opinion presents a cogent argument to the contrary, I am satisfied that there was an adequate basis for the trial court to conclude that the police station statement was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." (*Wong Sun v United States*, 371 US 471, 486.)

Although *Brown v Illinois* (422 US 590) is relevant to the issue presented, I do not agree that it is as clearly determinative of that issue as suggested in the dissenting opinion. There is a difference between the issue presented here and that addressed by the Supreme Court in *Brown* that surely has significance in

the balancing process required in determining whether challenged evidence must be suppressed as an exploitation of constitutionally invalid police behavior.

Brown (*supra*) was concerned with a defendant who was arrested without probable cause and who, at the time of his arrest, could not have been arrested anywhere in a manner consistent with constitutional requirements, and as to whom an arrest warrant could not properly have been then issued. Given the fact that there was here probable cause to arrest the defendant, a finding not disputed in the dissenting opinion, we are confronted with an arrest that could have taken place lawfully anywhere except in the defendant's apartment. This major difference in the character of the underlying illegality surely has some relevance in determining whether or not the challenged statement represented an improper exploitation of the underlying illegal act.

Significantly, in *United States v Johnson* (626 F2d 753, 759, *affd* 457 US 537), an important decision understandably relied on in the dissenting opinion, the Ninth Circuit rested its determination to suppress the station house statement on the conclusion that the defendant "[h]aving given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it". In this case, however, the testimony strongly indicates that the defendant was expecting the police to come, was relieved when they arrived at his apartment, and had made a clear prior decision to admit his guilt. Accordingly, there is strong support in the record for the conclusion that the defendant gave his written statement at the station house, not because he felt committed by what he had said at the apartment, but because of a considered decision made prior to the expected arrival of the police.

One other fact distinguishing this case from *Johnson* (*supra*) should be noted. *Johnson* involved an arrest of a person charged with a nonviolent crime. In this case, the police had substantial reason to believe that they were concerned with a dangerously violent person who had abducted and raped the deceased some four days before he killed her. Although the arrest cannot be justified as having occurred under exigent circumstances in the normal meaning of that term, it seems clear

that the police were acting under the pressure of a sense of urgency that the defendant should be taken into custody as soon as possible.

ASCH, *J.* (concurring).

Defendant's contentions that his arrest was not supported by probable cause and that his written confession, which was given after a *Miranda* warning, should have been suppressed are without merit.

Erika Jones, the daughter of murder victim Thelma Staton, reported to the police a conversation she had had with her mother prior to her death. Erika stated that her mother had told her that she had been kidnapped by the defendant, at knifepoint, from the home of her boyfriend, Herbert Stultz, and then raped by defendant four days before the murder. Staton's diary had an entry for that date to the same effect. Moreover, a friend and co-worker of the victim had informed the police that Staton had told her of the abduction. The police were also told that defendant had installed the lock on Staton's bedroom door. It had been locked from the outside after the crime and only defendant and the murder victim had keys. Staton's boyfriend, Stultz, told the police that a window had been broken in his apartment on the day of the abduction. Staton had refused to disclose the identity of the perpetrator to Stultz, out of concern for his safety. The day before she died, Staton told Stultz she was scared to death of defendant.

With this background of incriminating evidence, the police went to defendant's apartment. Defendant invited them in and told them he was glad they had come for him. After being informed of his *Miranda* rights and told by Detective Rivers that they were there with respect to Staton's death, the defendant poured himself a glass of wine and admitted he had slit her throat with a knife. He was arrested and taken to the station house. As the hearing court found, there was ample probable cause for his arrest. About one hour later, he was again read his *Miranda* rights and he once more gave a statement to Detective

Rivers. It was taken down by the officer and signed by defendant. In it, defendant admitted the facts of the crime in detail.

After the *Huntley* hearing, the court found that the police entry into the apartment without a warrant constituted a violation of the holding in *Payton v New York* (445 US 573), and, therefore suppressed the confession given in the apartment. However, because of the passage of time between the first and second confessions and the rereading of the *Miranda* rights, the court found that there was an attenuation which removed the taint of the *Payton* violation. We find, however, based upon the uncontradicted evidence before the court, that the entry of the police into the apartment was legal and not in violation of the dictates of *Payton v New York* (*supra*).

The testimony at the hearing was unequivocal that defendant voluntarily admitted the police officers, inviting them in and, in fact, even telling them he was "glad" they had come for him. He also told them, "Have a seat while I fix myself a glass of wine." In *Payton* (*supra*, at p 576), the United States Supreme Court held that "the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment * * * prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest". As noted, there was clearly consent on defendant's part to the police entry. Defendant's conduct in admitting the police and inviting them to sit down while he had a glass of wine negated any inference of coercion.

Even if the hearing court was correct in its determination that the initial arrest was illegal, the second written confession was not obtained by " 'exploitation of th[e] illegality' " but " 'by means sufficiently distinguishable to be purged of the primary taint' " (*Wong Sun v United States*, 371 US 471, 488; *see also, People v Rogers*, 52 NY2d 527). The hearing court, in any event, found, as we do, that any "taint" resulting from an illegal arrest was removed by the lapse of time between the statements and the rereading of the *Miranda* warnings before defendant made his second confession.

Brown v Illinois (422 US 590), cited by the dissent, is inapposite, even assuming the illegality of the arrest. There, the Supreme Court held that the reading of the *Miranda* warnings

by themselves would not per se break the causal connection between the illegality and the confession. Also, contrary to the facts of *Brown*, the arrest in this case was not made solely for questioning or investigation. The Police had investigated the murder fully and had ample probable cause to arrest defendant at the time that they went to this apartment.

ROSENBERGER, *J.* (dissenting).

I dissent and would reverse the judgment appealed from and remand the matter to Supreme Court for a new trial.

Defendant was arrested in his apartment, without a warrant, by police officers who entered the apartment with drawn guns while another officer was at a window on the fire escape. Police officers and detectives had gone to the defendant's apartment. When there was no response to their knocking at the door, one of the officers went down the fire escape to the window of defendant's apartment. That officer was on the fire escape for two or three minutes. He had knocked on the window and said "Police". A detective at the door called out: "Police". The defendant than admitted the detectives at his door, who, as noted, had their guns drawn. (One of the officers, when asked, on cross-examination at the hearing, by the defendant, *pro se*: "Did you have my consent to be in that apartment?", responded "No".)

The police conceded that no attempt had been made to obtain a warrant for the defendant's arrest. It was also conceded that they would have "taken him into custody (*for questioning*" (emphasis added) had he not wanted to talk to them. The defendant made inculpatory statements while in custody in the apartment.

Criminal Term correctly found that the defendant had submitted to police authority in admitting them to his apartment. The court suppressed the statements stating: "No more clear violation of *Peyton* [*sic*], in my view, could be established."

The defendant was taken to the 44th Precinct where *Miranda* warnings were once again read to him and where he signed an inculpatory statement. This statement was made one hour after

the unlawful arrest in the defendant's home. Thereafter, the defendant made a videotaped statement to an Assistant District Attorney. When asked by the Assistant District Attorney "Now that I have advised you of your rights, do you want to speak to me about the death of Thelma Staton?" The defendant responded: "Well, I really don't know what to say right now." The court suppressed the videotaped confession, finding no clear waiver of the defendant's right to remain silent. Having suppressed the statement made by the defendant in his apartment and the videotaped statement made by him to the Assistant District Attorney, the court nonetheless refused to suppress the written statement of the defendant finding "sufficient attenuation; the rights were given again." Presented for review on this appeal is this branch of the court's ruling on the motion.

Brown v Illinois (422 US 590 [1975]) is instructive on, and in my view determinative of, the issue here involved. In that case, the defendant was arrested at the entrance to his apartment for questioning regarding a homicide. He was taken to the police station where he was informed of his rights under *Miranda v Arizona* (384 US 436). About one hour after the arrest at his apartment he made an inculpatory statement. The Supreme Court of Illinois (56 Ill 2d 312, 317, 307 NE2d 356, 358) found the arrest to be unlawful, but declined to suppress the station house statement, finding that the giving of the *Miranda* warnings "served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' (*Wong Sun v. United States*, 371 US 471, at 486.)" In reversing the Supreme Court of Illinois, Justice Blackmun wrote (422 US, at pp 602-604):

"If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis* v. *Mississippi*, 394 U. S. 721, 726-727 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible

at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to a 'form of words.' See *Mapp* v. *Ohio*, 367 U.S., at 648.

"It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover* v. *United States*, 384 U. S. 436, 496-497 (1966).

"While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or 'but for' rule. The petitioner himself professes not to demand so much. Tr. of Oral Arg. 12, 45, 47. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson* v. *Louisiana*, 406 U. S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official midconduct are all relevant. See *Wong Sun* v. *United States*, 371 U. S., at 491. The voluntariness of the statement is a threshold requirement Cf. 18 U.S.C. § 3501. And the burden of showing admissibility rests, of course, on the prosecution."

In *United States v Johnson* (626 F2d 753 [9th Cir 1980], *affd* 457 US 537 [1982]), the defendant was arrested in his home by agents with drawn guns. He was given *Miranda* warnings and

agreed to cooperate. The defendant thereafter made a statement at a police station. The Ninth Circuit suppressed both statements, observing "Having given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it." (626 F2d, at p 759.)

In all cases in which consent of the defendant is at issue, the People have a heavy burden of showing the voluntariness of the alleged consent. (*People v Whitehurst*, 25 NY2d 389, 391 [1969]). On a motion to suppress statements, the burden of proof is upon the People to prove admissibility beyond a reasonable doubt. (*People v Huntley*, 15 NY2d 72, 78 [1965]).

In the instant case, Criminal Term properly suppressed the statement given by the defendant in his apartment on the grounds that the police officers should have obtained a warrant under *Payton v New York* (445 US 573). There was no reasonable explanation for the failure to obtain a warrant. Under existing law, an arrest warrant cannot be issued until an accusatory instrument has been filed (CPL art 120). Once an accusatory instrument has been filed a defendant may not be questioned in the absence of counsel. (*People v Samuels*, 49 NY2d 218 [1980]; *People v Settles*, 46 NY2d 154 [1978].) Quite possibly, the detectives may have felt it more expedient to arrest the defendant summarily, rather than seek a warrant, in light of the restrictions on questioning.

There was no significant intervening event between the defendant's initial statement, found by Criminal Term to be the result of his unlawful arrest, and the written statement which is the subject of this appeal.

OPPOSITION

BRIEF

88-1000
5-11

No. 88-1000 (9)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF NEW YORK
Petitioner

-v-

BERNARD HARRIS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

BERNARD HARRIS
In Propria Persona
Box 51
Comstock, New York 12821

OCTOBER 1988

26 pp

QUESTION PRESENTED

WHERE THE QUESTION PRESENTED IS INSUBSTANTIAL, AND PETITIONER DOES NOT CONTEND THAT THE REASONING OF THE NEW YORK COURT OF APPEALS IS AT ODDS WITH THE DECISIONS OF THIS COURT, OR THAT THE CONSTITUTION AND THE FOURTEENTH AMENDMENT ALLOW NOT DIVERSITY ABOVE AND BEYOND THE FEDERAL FLOOR OF PROTECTION, SHOULD CERTIORARI BE GRANTED?

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TABLE OF AUTHORITIES

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

N.Y. Crim.Proc.Law Art. 120
§ 120.10(1):

A warrant of arrest is a process issued by a local criminal court directing a police officer ... to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument ... commenced.

28 U.S.C. § 1257
§ 1257(3):

Provides that judgments or decrees rendered by the highest court of a State may be reviewed by writ of certiorari, ... where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, ... the United States.

N.Y. Constitution, Art. I, § 12

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and ... particularly describing the place to be searched, and the persons or things to be seized."

* * *

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, ... and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

U.S. Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. Amendent IV

"The right of the people to be secure in their persons, houses, papers, and effects, ... shall not be violated, and no Warrants shall issue, but upon probable cause, ... things to be seized."

U.S. Amendment XIV

" ... nor shall any state deprive any person of life ... without due process of law ... "

REASONS FOR DENYING THE WRIT

We oppose the grant of certiorari on the following grounds traditionally deemed controlling the proceedings of this nature.

I. VARIANT OF A SETTLED QUESTION DOES NOT MERIT REVIEW

As an initial matter, we submit that there is no basis for the contention that the New York Court of Appeals erred in construing the Fourth Amendment. Nor does the case present a substantial question not previously decided in one of its many variforms by this Court.

Here, police admission of the respondent's summary arrest as a matter of departmental policy erased any doubt of a purposeful Fourth Amendment violation. Petitioner's previous reliance on the attenuation exception to the exclusionary rule as a fallback position belies the claim of any misconstruction. And more importantly, it makes manifest that the petition opposed is bottomed on the well-trodden question of the admissibility of statements stemming from an unlawful arrest. See Lanier v. South Carolina, 474 U.S. 25.

Hence our first inquiry is whether this Court should entertain jurisdiction where the question, no matter how disingenuously contrived, is settled. We think not. To be sure, the power vested by § 1257(3) of Title 28 of the United States Code in this Court to review state judgments

repugnant to the Constitution may not be exerted to salvage mere judicial setback here for the practitioners of open and unchecked defiance of the warrant requirement.

No amount of dialectics or hair-splitting can convert the petition opposed into one meriting review. Obviously, the mere fact that petitioner's argument for admissibility within framework of an attenuation analysis employed by the Court of Appeals was unsuccessful does not warrant review. And indeed cognizant that the writ will not issue just to consider the variant of a settled question, petitioner now argues rather casuistically that this Court heretofore has not addressed the familiar issue of taint to statements by an antecedent illegality. Cf. Rawlings v. Kentucky, 448 U.S. at 106-107. But the law on the "fruits" doctrine has not been unsettled by the obscurity of statute, a dearth of precedents, or the radiations of hypercritical refinements.

Thus without quibbling over a rather ingenious but artificial distinction laid to caselaw labels, we take note that long before review was sought here, Brown v. Illinois, 422 U.S. 590, had settled that a confession obtained by custodial interrogation after an illegal arrest should be excluded in the absence of significant intervening events. We think this rationale applies here, for by an overwhelming consensus, that holding is now a principle of general application in Fourth Amendment jurisprudence. See Oregon

v. Elstad, 470 U.S. at 306 (opinion of O'Connor, J.). The course of decisions in the New York Court of Appeals exhibits a firm adherence to the same rationale. In fact, the holding did not fall into disfavor with the petitioner until petitioner's "winning" streak was snapped by this case which sharply points up the unabated aversion for warrants in the county whence the Payton case, 445 U.S. 573, originated over a decade ago.

Contrary to the petitioner's belated argument that the holding is inapplicable here (Pet. for Cert. 6), Brown did not exclude planned purposeful warrantless arrests designed to provide the opportunity for interrogation (App. to Pet. for Cert. 8a) from the parameters it set for the admissibility of statements stemming from an unlawful arrest. Writing for the Court, Mr. Justice Blackmun made clear that the exclusionary rule is directed to all unlawful searches and seizures when utilized to effectuate the Fourth Amendment. (Id. at 601). Brown's arrest, noted the Justice, was made without probable cause and without a warrant. (Id. at 591, 592). Arrests made without warrant or probable cause for questioning or "investigation" obviously was the target of the Brown decision. (Id. at 602). Moreover, we have found no case and the petitioner has cited none for the new proposition that Brown's attenuation analysis could not be properly applied where deterrance is most compelling in light of

the fact that the object of the illegal conduct was the securing of the evidence sought to be suppressed. See Allen v. Cupp, 426 F.2d 756, 759.

Since the petitioner continues to harp on "probable cause", suffice it to say that the manufacture of probable cause and the compromise of a probable cause hearing are grave matters. Here, petitioner was quick to object to the question whether the police officer thought the information he had was enough to swear out a warrant. When the primary source testified later at the trial, the dam of untruths broke open. When we challenged the finding as one inconsistent with state standards, petitioner sought refuge in a procedural bar that was unavailing. And beyond a few unembellished statements, no state court would test the finding by the requisite legal standard.

The theory that Payton wrought havoc on legitimate law enforcement may be grist for a treatise by those who seek further balkanization of a splintered and muddied area of the law. But there should be no alarm for the fact that Payton does not mitigate a conscious Fourth Amendment violation. Petitioner cannot disclaim the common knowledge that the proscribed police activity deliberately designed to obtain evidence is not inoculated against the warrant clause. If petitioner finds the Rawlings decision very attractive, it may only benefit from the radiations of

that case if it upgrades the performance of its operatives to the excellence of the commendable officers in Rawlings, supra.

To say, as the petitioner does, that the utter disregard for the warrant clause labeled Payton in caselaw is a "technical" Fourth Amendment violation, is to ignore the function of the warrant. To hypothecate that if an arrest made elsewhere by officers possessing probable cause is lawful, it should be lawful when made at the home absent some grave emergency, begs the question. And until this Court fashions a bad-faith exception to the exclusionary rule, we perceive no distinction between willful constitutional violations regardless of the label. Whether it be one without a warrant or probable cause, in either case, the Constitution is equally flouted. Of course, the police need not, to enforce the law effectively, violate the law. And it cannot be gainsaid that lawlessness does not change character where the impetus doubtless and concededly is purposiveness.

With this background, the absurd claim of mere fortuity that the police misjudged the respondent's apparent consent can only be attributed to the unexpected embarrassment after a legal dog fight had unmasked disobedience to a mandate of this Court. Simple, police and prosecutors had misjudged the life expectancy of an unconstitutional

practice nourished by legal fiction and the mealy-mouthed testimony of lawless elements in law enforcement. See e.g., People v. Millan, New York Law Journal, Friday, June 1, 1984, P. 12, Col. 3.

If we were to assent to the illusory resemblance which the petitioner conjures up in the facts of Rawlings and the case at bar (Pet. for Cert. 6), then the fatuous argument that this Court hath not addressed the taint question must fall of its own weight. And were we to intimate a grudging recognition of the alleged inapplicability of the Brown rationale, petitioner would appear to be caught between Scylla and Charybdis, for this alternate contention is untenable in the light of this Court's application of that holding in Rawlings, supra.

As a corollary, we further submit that insofar as jurisdiction exists only if the case presents a not insubstantial federal question, this case has no business here. See Sugarman v. United States, 249 U.S. 182, 184. Palpably petitioner's resort to an imaginary novelty and the salutary divergence of legal opinion between sovereign states reflects the insubstantiality inherent in cases unworthy of review. The vindication of a right guaranteed by State and Federal Constitutions is no longer at issue. The occasion to add to the attenuation exception something which is not there and which can only effectually distort its purpose

and utility does not present itself. And even the judgment which gave rise to the petition does not in any way depict the constriction of a constitutional right or legitimate law enforcement. Since jurisdiction was not conferred upon the Supreme Court merely to give the losing party in highest courts of states another hearing, See Magnum v. Coty, 262 U.S. 159, 163-164, it certainly should not be invoked to appease those who profess disrespect for the Constitution and a mandate of the Court. See App. to Pet. for Cert 8a.

Furthermore, it is urged here that the petitioner be jurisdictionally barred where the "not pressed or passed upon below" rule equally applicable to the State is not met because of its failure to raise the question of the inapplicability of the Brown holding in the state courts. And in this connection, we find support in the long-standing practice of the Court not to entertain jurisdiction where the questions involved were not raised in the state courts. See Brown v. Commonwealth of Mass., 144 U.S. 573, 580. Indeed at a later date, the Court would restate this position rather expansively in McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435, where it stated that:

> "[i]t is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.... In cases coming here from state courts.... there

> are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review." See 28 U.S.C. § 1257.

Thus where as here, these considerations are no less applicable, we think that an opportunity to consider whether the Brown holding is inapplicable should not be denied the New York Court of Appeals. After all, federal-state cooperation in the solution of crime under constitutional standards is enhanced only by recognition of their mutual obligation to respect the same fundamental criteria in their approaches. See Mapp v. Ohio, 367 U.S. 643, 658.

Since the New York Court of Appeals did not pass on the question, this Court may not do so. See Hill v. California, 401 U.S. at 805-806. Petitioner did not, prior to the final judgment of the New York Court of Appeals, raise the question of whether Brown's attenuation analysis was an improper vehicle for resolution of the question of taint. No petition for rehearing post-judgment to raise such question was made. Nor was the issue raised, briefed, or argued in New York appellate courts. The validity of the attenuation doctrine was never challenged. In this posture of the case, there can be no doubt that the question is not properly before the Court.

Applying an exclusionary sanction, however, was a routine act after a violation of New York Constitution, Art. I, § 12 and the Fourth Amendment had been found, and the Brown

attenuation analysis merely employed as a medium for resolution. And even the unsupported belief that the Court erred in invoking the exclusionary rule is negatived by the fact that only after both parties had briefed for admissibility and excludability on the grounds of the sufficiency or lack of attenuation thereof, did the court hold that the issue before it was limited to whether the causal connection between the illegality and the confession was attenuated (App. to Pet. for Cert. 2a). Hence, where the State itself had invoked an exception to the exclusionary rule, it cannot be said that the court invoked the rule, sua sponte, or committed error as a matter of law.

Finally on this phase, we take note that there are sound policy reasons, apart from the prudence in allowing a state court of last resort to pass first on the question, for adherence to the "not pressed or passed upon" rule. See Mapp v. Ohio, 367 U.S. at 676-677 (Harlan, J., dissenting). To be sure, the prospect of pressing an existing adequate and independent state ground into service in the light of decisions which reflect concern that Fourth Amendment rules governing police conduct have been muddied, and the requirements of judicial supervision of the warrant process diluted, cannot be discounted lightly. See New York v. P.J. Video, Inc., 475 U.S. 868, on remand 68 N.Y.2d 296; Patchogue-Medford Tchrs. Cong. v. Bd. of Ed., 70 N.Y.2d at 71-75 (Simon,

J., concurring); People v. Bethea, 67 N.Y.2d 364. As has been shown, petitioner's argument that Rawlings is analogous to the instant case undercut the claim that Brown's attenuation analysis is inapplicable to a conscious constitutional violation labeled Payton. Thus in the circumstances where the question presented--the variant of the fact-bound issue of taint to statements by an antecedent illegality--has ceased to be substantial by reason of having been settled by previous decisions, See Sugarman v. United States, supra, we submit that the Court should decline jurisdiction, or in the event that the writ is granted, enter an order of dismissal for want of jurisdiction. See Cardinale v. Louisiana, 394 U.S. 437, 438-439.

II. REASONING OF THE NEW YORK COURT OF APPEALS IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT AND THE MAJORITY OF THE FEDERAL COURTS

On any view of the petition, clear it is that the petitioner does not contend that the reasoning of the New York Court of Appeals is at odds with the decisions of this Court. Cf. Lanier v. South Carolina, supra. Indeed when the Lanier case was before this Court during its October Term, 1985, the Brown principle was stressed. And we think this makes sense where the focus of the opinion below is deterrence.

In addition, we also note that in the absence of contrary authority, the petitioner does not argue that the

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opinion below is in conflict with the decisions of the federal courts. See United States v. Milian-Rodriguez, 759 F.2d 1558, 1564-1565 (CA 11), cert. den. 474 U.S. 845; United States v. Vasquez, 638 F.2d 507, 525-528 (CA 2).

The short of the matter is this. Police officers vault statutory and judicial obstacles in the path of arbitrary arrests to accomplish an end. See N.Y. Crim.Proc.Law, Art. 120, N.Y. Constitution, Art. I, § 12. Respondent then seeks suppression of statement as obtained in violation of constitutional guarantee against illegal searches and seizures. And in the light of routine summary arrests by the police, the New York Court of Appeals holds the illegality as a "knowing and intentional" violation compelling suppression as a deterrence, and as a matter of policy. Therefore, we submit that the judgment should not be disturbed at the risk of an advisory opinion. See Herb v. Pitcairn, 324 U.S. 117, 125-126.

III. DIVERSITY ABOVE AND BEYOND THE FEDERAL FLOOR OF PROTECTION PRESENTS NO CONFLICT AMONG SOVEREIGN STATES

We submit that thc petitioner's contention of a "split" among the States on the application of the Brown rationale is easily disposed of by the wisdom of former Chief Justice Burger, who writing separately in California v. Green, 399 U.S. at 171-172, to emphasize the importance of allowing the

States to experiment and innovate, especially in the area of criminal justice, observed "that the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all States." And in this connection, we note that while some states have adopted Gates, 462 U.S. 213, others have not. The adoption of Leon, 468 U.S. 897, has not been unanimous. Nor has there been unanimity on capital punishment. See California v. Ramos, 463 U.S. 992. Yet, all this has not had a baleful effect on a healthy federalism.

The Federal Constitution merely defines the minimum level of individual rights, leaving the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority. Cooper v. Morin, 49 N.Y. 2d 69, 79. Nor is it arguable that there exists not an adequate and independent state ground to dispose of this case. See People v. Class, 67 N.Y.2d 431; State v. Opperman, 247 N.W.2d 673. Thus to presume that the state court of last resort will modify interpretation of its own law whenever this Court interprets comparable law differently is to run the risk of the Opperman shuttle. See State v. Opperman, 228 N.W.2d 152; South Dakota v. Opperman, 428 U.S. 364; State v. Opperman, 247 N.W.2d 673.

Here, none of the cases cited by the petitioner tends to support the extreme view that purposeful misconduct does not warrant exclusion as a deterrence. Actually, one of the

cases, Dixon v. State, 451 So.2d 877, involved not a purposeful preplanned arrest. Yeates, 732 P.2d at 352-353, which found "a mistake of judgment, not purposeful misconduct", supports the appropriateness of the Brown rationale. All three other cases,[1] had as a common denominator, the absence of conscious misconduct. Indeed, that there should be differences of opinion in application of the exclusionary rule is almost inevitable.

Divergence of opinion between sovereign states is not always a meal ticket to federal intervention, especially where a state's constitutional guarantee has been violated. We live under a unique concept of federalism and divided sovereignty between the nation and fifty states. And the point is that a state's constitutional guarantees were to be truly independent of the rising and falling tides of federal case law both in method and specifics.[2] Diversity of course, does not, above and beyond the federal floor of protection present a conflict among sovereign states. See Kaye, Dual Constitutionalism in Practice and Principle, 42 Rec.A.B. City N.Y.285, 304-309.

1. State v. Thomas, 405 So.2d 462 (no suggestion arrest undertaken as a subterfuge or for the purpose of securing a confession in custodial atmosphere); Thompson v. State, 285 S.E.2d 685, 686 (no purposefulness; laboring erroneously under belief no warrant needed for seizure); State v. Reffitt, 702 P.2d at 689 (no purposeful misconduct involved; no conscious wrongdoing--arguable mistake)
2. State v. Ball, 471 A.2d 347

With respect to the question whether the opinion below could constitute an independent and adequate State ground, petitioner relies on Michigan v. Long, 463 U.S. 1032, which requires "plain statement" or verbalization to such effect (Pet. for Cert. 5). But where the Court of Appeals took special note that respondent's contention was one for the suppressibility of statements obtained in the violation of State and Federal constitutional guarantees (app. to Pet. for Cert. 1a), it would be preposterous to entertain the notion that the court found no violation of the State Constitution, simply because it found the Fourth Amendment and decisions of this Court persuasive as a vehicle for exposition. See People v. Class, supra; South Dakota v. Neville, 459 U.S. at 567-571 (Stevens, J. with whom Marshall, J. joins, dissenting). To be sure, more than anything else, the offending officers here were more concerned with circumventing the procurement of a warrant in light of the prerequisite of filing a felony complaint which triggers the indelible right to counsel. (See N.Y. Crim.Proc.Law Art. 120; People v. Samuels, 49 N.Y.2d 218.

For aught one knows, the court could have concluded that federal law is "broad enough" to exclude the evidence in this case, and it therefore saw "no need to draw a distinction at this time" between state and federal. Cf. People v. Bethea, supra (rejecting Elstad). And if the proper

sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim because the state does not deny any right claimed under the federal Constitution when the claim is in fact fully met by state law, this Court's request for clarification from the Court of Appeals will go a long way to avert undue intrusion on the state judicial process. See Massachusetts v. Upton, 466 U.S. 726, 737 (quoting Sterling v. Cupp, 625 P.2d 123, 126) (Stevens, J., concurring), on remand 476 N.E.2d 548; California v. Krivda, 409 U.S. 33, on remand 504 P.2d 457, cert. den. 412 U.S. 919. And this may very well be one of those circumstances where clarification is necessary and desirable. See Michigan v. Long, supra at 1041, n.6. It could not be more important in matters of jurisdiction. See Cox Broadcasting Corporation v. Cohn, 420 U.S. at 510, n.7, Rehnquist, J., now C.J., dissenting.

This, however, is not to say that we are unmindful of the premise that vacatur and continuance are unacceptable. But in any event, whatever degree of delay and decrease in the efficiency of judicial administration there be is a lesser evil than the pastime whereby having found the Long doctrine blissful, losing prosecutors, aware of state grounds of sufficient breadth to sustain adverse rulings, now journey here with greater frequency than ever before on the "plain statement" passport.

Hence, in the light of dockets swollen with requests by state attorneys to reverse judgments that their courts have rendered in favor of their citizens, Michigan v. Long, supra, at 1069-1072, n.3 (Stevens, J., dissenting), it cannot be said that the plain statement doctrine provides state judges with the "opportunity" to develop state jurisprudence unimpeded by federal interference. Indeed the unhappy prosecutor, perhaps finding this Court more sympathetic, would rather race here than seek a simple clarification in the state court of last resort. Nor can it be gainsaid that prosecutors thrive on the welter of opinions reached here regardless of the fact that they in no way foreclose their disposition on existing adequate and independent state law and grounds. Thus if the respect for the independence of state courts is not hollow, those tribunals may not be condemned to the wooden recital of the "plain statement" each time a judicial decision is made with this Court looking over their shoulders.

What sets New York Law apart in the area of individual rights is the legislative intent to limit the power of the police, and to set a judicial "bright-line" expressway. See Bellacosa, now Judge of the New York Court of Appeals, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL Art. 120, at 110-112. And where the question is one of the providing guidance to police personnel in performing their

duties, the practical considerations upon which uniformity between State and Federal courts rests must yield to a predictable, structured analysis of the quality of evidence necessary to support intrusive searches and seizures. People v. Johnson, 66 N.Y.2d 398. Surely where the lawfulness of the police conduct is not inoculated against the standards of our State Constitution, the State remains free as a matter of its own law to impose greater restrictions on the proscribed activity than the United States Supreme Court holds to be necessary under federal constitutional standards. See Oregon v. Hass, 420 U.S. 714, 719.

Nothing in New York Law establishes any presumption that the State Constitution adds no additional protection for New York residents beyond those already provided by the provisions of the Fourteenth Amendment to the Federal Constitution. And not even fluctuations in this Court's adjudicatory process or the rising and falling tides of federal decisional law has altered the fact that "a bedrock principle of New York Law is that police must obtain a warrant made possible only by the filing of a felony complaint which triggers the indelible right to counsel. See N.Y. Const., Art. I § 12; N.Y. CPL Art. 120; People v. Samuels, supra. Indeed under New York Jurisprudence, it is conceptually untenable to justify a warrantless search or seizure in the absence of exigent circumstances. See People v. Clements,

37 N.Y.2d at 686, and People v. Payton, 45 N.Y.2d at 315 (Wachtler, J., now Chief Judge, dissenting).

Lastly, while the warrant for an arrest in Arizona, Florida, Georgia and Idaho--loci of the cases cited by the petitioner--may be obtained upon the mere swearing of an affidavit of probable cause as is the federal law enforcement practice, New York requires more, not less. Thus in view of the inefficacy of advisory opinions, and the dire scarcity of judicial resources, we submit that remand would be proper unless the utterance of "we reach the same conclusions by applying the exclusionary rule established under our State law", See People v. Stith, 69 N.Y.2d 313, 316, n.*, is worth the time and costs of full briefing and oral argument.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE NEW YORK COURT OF APPEALS SHOULD BE LEFT UNDISTURBED, OR IN THE EVENT THE WRIT IS ISSUED, THAT REMAND BE ORDERED IN THE LIGHT OF EXISTING ADEQUATE AND INDEPENDENT STATE GROUND, OR THE WRIT BE DISMISSED AS IMPROVIDENTLY GRANTED FOR WANT OF JURISDICTION

Respectfully submitted,

BERNARD HARRIS
IN PROPRIA PERSONA
BOX 51
COMSTOCK, NEW YORK 12821

MARCH 1989

JOINT

APPENDIX

88-1000 (2)

IN THE

Supreme Court of The United States

OCTOBER TERM 1989

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-against-

BERNARD HARRIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1988
CERTIORARI GRANTED APRIL 17, 1989

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CHRONOLOGICAL LIST OF RELEVANT ENTRIES

DATE	PROCEEDINGS
February 6, 1984	Indictment No. 317/84 is filed against Bernard Harris in Supreme Court, Bronx County.
April 11, 1984	Mr. Harris moves to suppress his confessions.
February 14, 1985	A pretrial hearing to determine the admissibility of the confessions commences before Justice Irving Lang.
February 19, 1985	Justice Lang renders his decision granting the motion to suppress in part and denying it in part.
February 20, 1985	A non-jury trial commences before Justice Lang.
February 25, 1985	Justice Lang renders a verdict convicting Mr. Harris of Murder in the Second Degree. In the course of delivering his verdict, Justice Lang rearticulates his reasons for denying the motion to suppress the precinct confession.
April 29, 1985	Justice Lang imposes judgment sentencing Mr. Harris to 15 years to life in prison.
April 29, 1985	Mr. Harris files a notice of appeal from the judgment.

DATE	PROCEEDINGS
November 6, 1986	The New York Supreme Court, Appellate Division, First Department, affirms the judgment. Justices Leonard H. Sandler and Richard W. Wallach concur in a memorandum; Justices Sidney H. Asch and Bentley Kassal concur in a separate memorandum; Justice Ernst H. Rosenberger dissents in a memorandum.
February 24, 1987	Justice Rosenberger grants Mr. Harris permission to appeal to the New York Court of Appeals.
October 20, 1988	The New York State Court of Appeals reverses the order of the Appellate Division. Judge Vito J. Titone concurs in a separate opinion; Chief Judge Sol Wachtler and Judge Joseph W. Bellacosa dissent in a separate opinion.

Supreme Court of the State of New York
Bronx County: Trial Term Part 56: Crim. Div.

THE PEOPLE OF THE STATE OF NEW YORK,
—against—
BERNARD HARRIS,
Defendant.

INDT #317/84
Thursday, February 14, 1985
BEFORE: THE HON. IRVING J. LANG,
J.S.C.

* * *

TRANSCRIPT OF PROCEEDINGS AT THE PRETRIAL SUPPRESSION HEARING

* * *

COLLOQUY IN WHICH MR. HARRIS MAKES HIS FEDERAL CONSTITUTIONAL ARGUMENTS IN FAVOR OF SUPPRESSION

* * *

[3]

THE DEFENDANT: The Mapp issue is not covering the knives—it is covering the statements taken from my apartment. On the Amendment, I think we can contest the Mapp issue.

THE COURT: The purpose of the Mapp, Mr. Harris, as I assume you know, is to suppress evidence which has been seized illegally. If the evidence is not going to be produced, we don't have to suppress it.

[4]

THE DEFENDANT: We can suppress verbal evidence.

THE COURT: That's the Huntley. We are having that.

THE DEFENDANT: Everybody is talking about voluntariness. I'm talking about an arrest without probable cause and without a warrant, in my apartment.

THE COURT: That is an issue which will properly be dealt with at the Huntley hearing. That is an appropriate issue to be raised as to whether or not the interrogation had a basis.

* * *

MR. HARRIS IS GRANTED PERMISSION TO PROCEED *PRO SE*

[24]

THE COURT: Here's what I'm going to do, tentatively: I'm going to let you represent yourself for the Huntley Hearing, keeping Mr. Rossmer aside for you to consult with him with respect to any legal issues or to have him suggest to you any questions that might be appropriate because he's familiar with the area, and then we will see what happens after that with respect to the trial.

* * *

DETECTIVE WILLRICK RIVERS' EXPERIENCE AS A POLICE OFFICER

* * *

[29]

Q. Detective Rivers, how long have you been a member of the New York City Police Department?

A. Eighteen years.

Q. How long have you held the rank of Detective?

A. Approximately thirteen years.

* * *

DETECTIVE JOHN McCARTHY'S EXPERIENCE AS A POLICE OFFICER

* * *

[148]

Q. Detective, what's your present assignment?

A. I'm assigned to the 44th P. D. U.

Q. How long have you been a member of that squad?

A. Approximately 3 years.

Q. Before that were you assigned to a precinct in the Bronx?

A. Yes, I was assigned to the 42nd Precinct for 15 years.

* * *

POLICE OFFICER JOHN MICHAEL EGAN'S EXPERIENCE AS A POLICE OFFICER

* * *

[180]

Q. Officer Egan, how long have you been a member of the New York City Police Department?

A. Eighteen years.

Q. How long have you been assigned to the 44th Precinct Detective Unit?

A. Two and a half years.

* * *

TESTIMONY OF DETECTIVE RIVERS

* * *

[35]

THE WITNESS: And further, that he forcibly made her make love to him.

Q. What else did Erica Jones tell you?

A. She gave me the address of where Jedi was living, which was 960 Sheridan Avenue, apartment 3-F.

Q. Did she give you any other information?

A. Yes. She also had told me that Jedi had called her mother on the eighth, and that she did hear her mother tell him over the 'phone that she did not want to speak to him again, and for him to stop bothering her.

Q. Did she give you any information about the lock that was on the door?

A. Yes. She stated that Jedi had put the lock on the bedroom door for her mother, and that the only persons that had keys to that door was her mother and Jedi.

* * *

[37]

Q. What information did you obtain at that time?

A. DD-5 number two. During the search of the apartment, I did find said book. In that book was a summons taken out for harassment against one Bernard Harris.

* * *

A. (cont'g) And also in the deceased's handwriting, under the note section of the book, the date Saturday, January 7, 1984: Jedi entered Herbie's apartment through window; abducted me.

Q. What did you do with that book, sir?

A. It was vouchered.

* * *

[39]

Q. Who did you speak to at 960 Sheridan Avenue?

A. I spoke to the superintendent of the building first, and I also spoke with the mailman that delivers mail at that address.

Q. And what information did you learn after you spoke to those two people?

A. From their information they give me, Mr. Bernard Harris and Jedi Ojunbajo was the same person and the only person living in apartment 3-F.

* * *

[60]

A. (Examining) That's DD5 No. 3. She told me that on 1/7/84 she returned home at approximately 17 hundred hours after spending the night of 1/6/84 over at the friend's house.

She told me that when she entered the apartment her mother seemed a bit worried and that later in the evening her mother told her that she had spent the previous night over at her friend's Herbie's apartment and that on the morning of 1/7/84 she was alone in the apartment and that Jedi had come up there and broken into the apartment through the window and that he did put a knife to her throat, threatened her and brought her back to 270 East 162nd St., Apt. 8, where he forcibly made love to her.

* * *

[61]

She also told me that Jedi was a fellow who her mother had been seeing until recently. She states that Jedi had put on the lock on her mother's bedroom door and that he was the only person that had a key other than her mother for the bedroom door.

She further stated that on January the 1st, 1984, Jedi did call her mother and she heard her mother telling him to stop calling. That she did not want to speak to him again and informed him to stop bothering her.

* * *

[66]

Q. Could you tell the Court the purpose of your trip to 960 Sheridan Avenue?

A. Yes, to locate Mr. Bernard Harris and to speak to him regarding the murder of Thelma Staton.

* * *

[67]

THE COURT: That is not the question I gave you. Did you intend to arrest Mr. Harris? I will put it this way, since you are hesitating, you knock on the door, Mr. Harris answers. You say, police. He does not want to talk to you. Would you just walk away or would you take him into custody?

THE WITNESS: I would have taken him into custody for questioning, your Honor.

* * *

[68]

Q. Well, I'll put it this way: then you left the 44th Precinct to arrest Mr. Harris; is that correct?

A. Yes, to take him into custody for questioning.

THE COURT: Fine, to take him into custody and question him.

* * *

[109]

Q. And take him into custody. Then it was your purpose to arrest him?

A. Yes.

* * *

TESTIMONY OF DETECTIVE McCARTHY

* * *

[156]

THE COURT: We know that detective Rivers was going to attempt to take Mr. Harris in custody. Did you know?

THE WITNESS: I didn't know that, your Honor.

THE COURT: You didn't know that?

THE WITNESS: No.

Q. Wo [sic] you went on a trip and you didn't—

THE COURT: Did you know he was a suspect in

[157]

a homicide?

THE WITNESS: Yes.

THE COURT: Did you know that Rivers intended to pick him up?

A. Yes. Yes.

THE COURT: All right. Come on. Let's not play games.

MS. SUGARMAN: Judge, why don't you ask him the question he asked Detective Rivers; if it was his intention to take him into custody? If that's the line of questioning, can he answer that question? If that's the line the defendant wants to proceed and you're proceeding on, why don't you ask him the question he asked the detective?

THE COURT: Why don't you ask him?

THE DEFENDANT: I'll let her ask him.

THE COURT: Ask him.

THE DEFENDANT: You want me to ask him?

THE COURT: You can ask him.

THE WITNESS: He gave me my answer.

* * *

[165]

Q. You and Rivers were at the door of Mr. Harris?

A. Yes.

Q. And I understand that you know the gravity of the crime you were investigating?

A. Yes.

Q. Okay What—assuming—I mean, suppose—well, let me say, if there was no admittance, if you were not allowed to come in, what would you do?

A. I would have turned around and walked out.

Q. Walked away?

A. Yes.

Q. With Mr. Rivers?

A. I don't now what Mr. Rivers would have done. I know what I would do.

Q. You would walk away?

A. Certainly.

* * *

TESTIMONY OF POLICE OFFICER EGAN

* * *

[183]

Q. Mr. Egan, what took you to 960 Sheridan on January 16, 1984?

A. Detective Rivers asked me to accompany him to that location.

Q. Do you know why you went along?

A. Yes, I did. He asked me to accompany him—Detective Rivers.

Q. Do you know why you accompanied him?

A. Why?

Q. Yes.

A. I believe he wanted question a suspect.

Q. He wanted to question a suspect?

A. Yes, sir.

Q. When you got to 960, I understand from what you just said that McCarthy asked you to go up the fire escape; is that correct?

A. He suggested I go up the fire escape, yes.

Q. After that suggestion, do you still believe that the purpose of your trip was to question Mr. Harris or to arrest him?

[184]

A. Question Mr. Harris.

Q. So you go up the fire escape to go question him; right?

A. I went down the fire escape. I went up one flight and came down the fire escape.

Q. To question him?

A. Not to question him. To see if Mr. Harris was in the apartment.

* * *

TESTIMONY OF DETECTIVE RIVERS

* * *

[64]

THE COURT: Did you attempt to obtain a warrant on the 16th?

THE WITNESS: No, your Honor.

THE DEFENDANT: Maybe, I think, I'll have to come back and try another highway.

Q. (Contg.) Det. Rivers, from all indication and from whatever you have, could you tell us if you made any attempt to get a warrant?

THE COURT: He just said he did not.

THE WITNESS: I did not.

Q. Is it the custom of your department—

MS. SUGARMAN: Objection.

THE DEFENDANT: Is this customary of his department?

THE COURT: Is it customary to get warrants?

THE DEFENDANT: No, of his department.

THE COURT: Of his department to do what?

THE DEFENDANT: To get a warrant or not to get a warrant.

THE COURT: Is it customary in these situations to get arrest warrants?

THE DEFENDANT: No, his department.

THE COURT: His apartment?

THE DEFENDANT: His department.

* * *

[65]

THE COURT: In your department is it customary to get warrants?

THE DEFENDANT: Or not.

THE DEFENDANT: No, your Honor.

THE COURT: He says, no.

Q. It's not your custom to get warrants?

A. No.

Q. You never get a — attempt to?

THE COURT: He did not say, never. He said it was not the custom.

* * *

TESTIMONY OF DETECTIVE McCARTHY

* * *

[166]

Q. I assume at that point you had no warrant?

A. That's correct.

* * *

TESTIMONY OF DETECTIVE RIVERS

* * *

[41]

Q. And what did you do on that day, sir?

A. On that date, Mr. Bernard Harris was arrested and charged with the murder of Thelma Staton.

Q. Did you at any time go to 960 Sheridan Avenue on that date?

A. Yes, I did. At approximately 1830 which is 6:30, accompanied by Detective McCarthy and Police Officer Egan we went to 960 Sheridan Avenue, apartment 3-F.

Q. How did you gain access to the building?

A. Someone was coming out the door as we were going in.

Q. And what, if anything did you do after you went into the building?

A. We went up to apartment 3-F, knocked on the door.

Q. What happened then?

A. After knocking a few times, the door was opened by Mr. Harris.

Q. Now, Detective Rivers, you said you knocked on the door. Can you describe, please, how you did that?

A. I knocked.

(Witness knocks on court bench.)

[42]

Q. Who was with you at that time when you were knocking on his door?

A. Detective McCarthy was at the door with me.

Q. Sir, did you have your gun displayed at that time?

A. No, it was not.

Q. Now, you said someone came to the door. What happened when—the first thing that happened after you knocked?

A. Someone said, "Who is it?"

Q. And what did you say?

A. I said, "Police." And I put my shield to the peephole.

Q. And what happened next?

A. The door was opened.

Q. Go ahead.

A. I identified myself as Detective Rivers from the 44th Precinct. I was told—you know—"Come into the apartment" by Mr. Harris.

• • •

[113]

THE COURT: Did you have your weapon drawn?

THE WITNESS: It was drawn, yes.

THE DEFENDANT: Good. Good enough for me.

THE COURT: Where was it?

THE WITNESS: In my right coat pocket, your Honor—it was not visible.

THE COURT: What do you mean by visible?

THE WITNESS: I had it out of my holster; I had my hand on it in my coat pocket.

• • •

TESTIMONY OF DETECTIVE McCARTHY

[153]

Q. Detective, when you were at the front door, where was your weapon?

A. In my hand.

Q. And where was your hand at that time?

A. Parallel to my leg.

Q. Where were you standing in relation to the front door?

A. To the left.

Q. Were you standing facing the door or was your side to the door?

A. I was to the side of the door.

Q. Was the—

A. My body partially in front of the door—

Q. Was the hand with your weapon in it facing the door or was it away from the door?

[154]

A. It was away. It was facing the door. (indicating)

Q. Did you ever at any time point your weapon at Mr. Harris?

A. No.

Q. Why did you have your weapon out?

A. Well, Detective Rivers was going for a suspect and I felt that my life could have been endangered.

Q. Now, did you enter the apartment with the weapon in your hands?

A. No.

Q. When did you reholster your weapon?

A. When Mr. Harris opened the door and I observed his appearance. I decided that he was no threat to me. That's when I put my gun in the holster, right outside the door.

Q. You said he was in a T-shirt and trousers?

A. Well, his size, too didn't frighten me.

Q. Did any of the officers, as far as you know, have their weapons drawn in the apartment or displayed in the apartment?

A. No.

Q. Did you ever threaten Mr. Harris?

A. No.

* * *

TESTIMONY OF POLICE OFFICER EGAN

* * *

[181]

A. I believe Detective McCarthy knocked on the door. At that time we noticed a light under the door. Detective McCarthy suggested I go on the fire escape. I went up one flight of stairs—the apartment directly above Mr. Harris's apartment, knocked on the door, identified myself and asked the people if I could go to their fire escape. They agreed. I went out their fire escape and went down the fire escape to Mr. Harris's window. I tapped on the window, stated, "the police." No response. I was there two or three minutes. Detective McCarthy yelled to me, "It's all right, Jack, we're in." At that time I went back upstairs, out the apartment; downstairs and into Mr. Harris's apartment.

Q. At anytime did you have your weapon drawn, sir?

A. No, I didn't.

[182]

Q. Did you have it out of your holster at any time?

A. No, I didn't.

* * *

TESTIMONY OF DETECTIVE RIVERS

* * *

[43]

A. The door was opened. This person said, "Come inside." As I entered the apartment, the person said, "I'm glad you came for me."

Q. Now, when you say the person, you're referring to the defendant; is that right?

A. Mr. Harris, yes.

Q. Tell us what happened then.

A. Okay. We—I entered the apartment. Mr. Harris—at this time, Mr. Harris was read his Miranda warnings.

* * *

TESTIMONY OF DETECTIVE McCARTHY

[151]

A. As we walked in, Mr. Harris stated, "I'm glad you came for me."

Q. And then what happened?

A. At that point, I nudged my partner, Detective Rivers, and I suggested that he give Mr. Harris his rights.

Q. And did you see Detective Rivers do that?

A. I did.

Q. And did you see what he used to give him his rights?

A. Yes. He read the rights from a small card that he took out of his wallet.

* * *

[152]

A. Well, I came back into the living room where Mr. Harris and Detective Rivers were talking.

Q. Did you hear any of their conversations?

A. I learned some of the conversations.

Q. Tell us what you heard?

A. I heard Mr. Harris explaining what a bad woman Mrs. Staton was; how she didn't care for her children and that was why he killed her.

TESTIMONY OF DETECTIVE RIVERS

[47]

Q. Detective at that point, what happened after you read the defendant his rights and he told you he would speak to you? What happened?

A. He said—he told us to have a seat while he fixed himself a glass of wine.

* * *

[48]

A. He poured a glass of wine and he started talking to me, telling me that he loved Miss Staton; she wasn't a fit mother for the child; he loved the child; she wasn't bringing her up right; and that he killed her.

Q. Did he tell you any other details about how he killed her?

A. He said he slit her throat with a knife.

Q. Did he give you any other information?

A. At this time?

Q. Yes.

A. No.

Q. What, if anything, happened at that point, Detective?

A. At that point he was informed that he was under arrest, and he was taken into the 44th Precinct.

Q. Who was in the apartment when you were interviewing the defendant?

A. Myself, Detective McCarthy and Police Officer Egan.

[50]

Q. Who accompanied you and the defendant from his apartment to the 44th Precinct?

A. Detective McCarthy and Police Officer Egan.

* * *

[252]

THE COURT: How long did you remain in the apartment before you went to the precinct?

THE WITNESS: Maybe about fifteen minutes, your Honor—I'm not sure.

THE COURT: About fifteen minutes?

THE WITNESS: Fifteen.

THE COURT: So that would be about 6:45?

THE WITNESS: More or less, your Honor.

THE COURT: And do you recall what time you got to the precinct?

THE WITNESS: Maybe another fifteen minutes, your Honor—ten, fifteen minutes.

THE COURT: That would be about 7:10, 7:15.

THE WITNESS: More or less, your Honor.

* * *

[50]

Q. Did there come a time you arrived at the 44th Precinct?

A. Yes.

Q. What, if anything, happened at that time?

A. Mr. Harris was again given his Miranda rights.

Q. Was it the same as you testified to before?

A. Correct.

Q. Using People's 1 in evidence?

A. Yes.

Q. And what, if anything, happened after he was given his rights a second time?

[51]

A. A written statement was taken from Mr. Harris.

Q. How did that take place, Detective? Tell us about that.

A. He was given the rights, and he was informed—asked if he would be willing to speak, make statement to myself and to the District Attorney's Office, and he said yes.

Q. Were you writing while he was speaking, or did he speak and then you wrote? How did the writing take place?

A. As he was speaking, I told him to go along slowly and I was writing as he was speaking.

Q. What did you do after you completed—or did there come a time after you completed that writing, sir?

A. Yes there did.

Q. What happened then?

A. I gave the statement to Mr. Harris to read to see if that's what he had told me.

Q. Did Mr. Harris read that statement?

A. Yes, he did.

Q. Did he tell you anything about that writing, sir?

A. Yes. There was—on the second page, there was a part that I had written, that he had taken the knife over there with him, and he informed me that he did not. He said he picked it up from in the kitchen, and that statement was corrected, and initialed by Mr. Harris.

[51A]

Q. Did you ask at any time, Mr. Harris, to do anything further with that statement?

A. Yes—to sign the statement.

[52]

Q. And where did he sign it?

A. He signed at the bottom of the second page.

* * *

JUSTICE LANG'S RULING GRANTING THE MOTION TO SUPPRESS IN PART AND DENYING IT IN PART

* * *

[222]

THE COURT: All right. The Court makes the following findings of fact and conclusions of law:

In investigating a homicide, the police developed not only reasonable grounds to suspect, but clearly probable cause to believe that the defendant had committed the homicide. There was evidence of virtually—of motive, of prior violent act. The fact that the deceased was found in a bedroom which was locked, which only the deceased and the defendant had the key, all pointed clearly to the fact that there was ample probable cause to arrest the defendant.

While the District Attorney attempts to couch the

[223]

actions of the police in terms of going to investigate, that, in my view, is clearly nonsense as Detective Rivers clearly indicated he was going to take the defendant into custody.

MS. SUGARMAN: Judge, may I comment on that?

THE COURT: No.

In any event, three police officers went—I find as a fact—take the defendant into custody and properly so, that is, with probable cause for the crime. They knocked on the door. There was no answer to the door—to the knock. One of the police officers went over the roof—or rather up to the next floor through an apartment, getting permission to go down the fire escape, and knocked on the window, at which point the officers with their guns at their side ready to proceed when the defendant opened the door and submitted

to their authority. No more clear violation of Peyton [sic], in my view, could be established.

Therefore, the statement, albeit voluntary within the generic meaning of the term, and after the appropriate rights had been given by the officer in the house, is suppressed.

With respect to the statement in the stationhouse, I find that there was a sufficient attenuation; the

[224]

Rights were given again.

I find that the action of taking him into custody at the house, was not the primary cause of his giving the statement, but rather was independently given by him voluntarily. Therefore, the statement which the defendant signed, given to Det. Rivers, with appropriate warnings and appropriate waivers, is admitted into evidence. It will be permitted to be admitted into evidence.

* * *

JUSTICE LANG'S RULING ADHERING TO HIS DECISION UPON REARGUMENT

* * *

[253]

THE COURT: All right. I have read the cases cited by the defendant, and after reviewing the cases, the Court finds that the Peyton [sic] violation was not what the Supreme Court has termed a gross or flagrant violation; that an interval of approximately an hour took place between the initial illegal arrest—albeit based on probable cause, which was not the situation in Johnson where the arrest was made without probable cause.

THE DEFENDANT: They had probable cause.

THE COURT: What?

THE DEFENDANT: In Johnson, they had probable cause.

[254]

THE COURT: Oh, I'm sorry. It wasn't Johnson I was referring to. Brown versus Illinois was the one without probable cause. You're right.

Under all the circumstances, I adhere to my original determination that the action of the government was not so flagrant as to constitute a violation, and that the passage of time and the minimal intrusion appropriately attenuated the taint with respect to that. You have an exception to my ruling.

* * *

TRANSCRIPT OF PROCEEDINGS AT TRIAL

* * *

[245]

Supreme Court of the State of New York

Bronx County: Trial Term Part 56: Crim. Div.

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

BERNARD HARRIS,

Defendant.

INDICTMENT #317/84

Wednesday, February 20, 1985

BEFORE: THE HON. IRVING LANG,

J.S.C.

Appearances: (same as previously noted.)

Non-Jury Trial and Hearing continued.

* * *

TESTIMONY OF DETECTIVE RIVERS

* * *

[347]

MS. SUGARMAN: Your Honor, I ask that it be accepted into evidence.

THE COURT: All right, deem marked in evidence —marked into evidence, People's 7, Miranda Card.

(People's 7 for identification, marked and received as People's 7 in evidence.)

THE COURT OFFICER: People's 7 now in evidence.

Q. Det. Rivers, would you tell us, please, what you said to him and what he said to you when you read him his rights from People's 7 in evidence?

A. "You have the right to remain silent and refuse to answer questions. Do you understand?" He said, "Yes."

"Anything you do say may be used against you in a court of law. Do you understand?" He said, "Yes."

"You have the right to consult an attorney before speaking to the police, and to have an attorney present during any questioning now or in the future. Do you understand?" He said, "Yes."

"If you can not afford an attorney, one will be provided for you without cost. Do you understand?" He said, "Yes."

"If you do not have an attorney available, you have the right to remain silent until you have an opportunity to consult with one. Do you understand?" He said, "Yes."

[348]

"Now that I have advised you of your rights, are you willing to answer questions?" He said, "Yes."

Q. And did he make any statement to you after you read him his rights?

A. Yes, he did.

* * *

[349]

Q. Detective, I'd ask you to look at People's 8. Is that the statement that you wrote while the defendant was speaking?

A. Yes, it is.

* * *

Q. Is that in the same condition, sir, as when the defendant signed it?

A. Yes, it is.

Q. On the second page there is a cross-out line, on the bottom part. How did that take place?

A. After the defendant was given this statement to read,

[350]

he stated that I had made a mistake in stating that he had taken all the knives with him. It was crossed out, and I initialed it.

Q. You re-wrote—

A. Re-wrote what he said.

Q. And did you ask the defendant to sign that statement?

A. Yes, I did. He did.

Q. Where did he sign it?

A. It was signed on the bottom of the page.

Q. Is that in the same condition as when the defendant signed it on January 16, 1984?

A. Yes it is.

MS. SUGARMAN: Your Honor, I ask it be accepted as People's 8 in evidence.

MR. ROSSMER: I assume we would object, based on the previous—

THE COURT: Objection overruled. Mark it in evidence, People's Exhibit 8.

(People's Exhibit 8 for identification now marked as People's Exhibit 8 in evidence.)

THE DEFENDANT: Is that the first person narrative?

THE COURT: What you call Statement B, I'll read it:

January 16, 1984; 1945 hours; 44th Precinct.

[351]

Statement given by Bernard Harris, clerical office. "I knew Thelma Staton since July of 1982. I met her at the subway stop at 149th Street and Grand Concourse. Her and

I had been dating since then. I was in love with Thelma. She made me quit visiting bars and fooling around with other women.

In December of 1983, I realized that Thelma was fooling around with an ex-boyfriend of hers named Herbie. I found out that she was sleeping over at his house on some weekends. On Saturday, January 7, 1984, I went up to Herbie's house and broke in through the glass window, and found Thelma in the apartment with only her robe. I said to her, "Mamie" you don't belong here, you have an option to go to our house or to my house. She said, "Let's go to my house." We left and went to her house and we made love and spent the day together. I left her house at approximately four p.m. that evening."

I can't tell—is that an a.m. or p.m.?

THE WITNESS: P.M., your Honor.

THE COURT: P.M. "That same Saturday night she called me at approximately eleven p.m., told me she was going to give my phone number and address to 'Herbie'. I didn't see Thelma again until Wednesday,

[352]

January 11, 1984. On Wednesday, January 11, 1984, sometime in the morning, I walked over to Thelma's building, 270 East 162nd Street. The downstairs door was not locked, so I went up to the fifth floor where Thelma lives, (Apartment 8). Thelma came out of the apartment and I hid on the stair above the apartment. Thelma walked down to about the third or fourth floor. Then she came back up. She went back into the apartment and as she was coming back out, I stopped her in the doorway and I told her, 'Be cool'. We then went back into the apartment, and into the bedroom. I told her to take her clothes off. She did. I said to her, 'Okay now, tell me the truth.' She continued telling me lies. A struggle started and then I cut her throat with a knife that I picked up from in the kitchen. I locked the bedroom door and I threw the knife out of one of the windows. I don't

remember which window. I then went home and went out in the street.

"This is a true statement given by me, Bernard Harris, to Detective W. Rivers of the 44th P.D.U."

* * *

TESTIMONY BY MR. HARRIS

* * *

[504]

On the 16th of January, on my birthday, I was in my apartment, and about 7:30, two men appeared at my apartment door; and one was in my fire escape window. When I looked out, I saw the guy on the fire escape with a gun in his hand. And as they were banging on my apartment, I asked questions: "Who is it? Who is it?" And there was no response. When the banging continued, I decided that whoever is at this door was going to break into this apartment. I went to the door, and as I opened the door, two guys barged into the apartment with their guns on me. The first question, "You Bernard Harris? You Bernard Harris?" I live alone. I say, "Yes, I'm Bernard Harris." The next question: "Do you live alone?" I said, "I live alone." Took me down to the foyer in the apartment; threw me against the wall; searched my pockets and everything up and down; held me by the collar of my jacket, and then took me into my bedroom.

So they told me, "Do you know Thelma Staton is dead?" Next question: "You slashed her. You'd better tell me you slash her—slashed her." And I'm referring to McCarthy now. And I'm looking at this guy.

In the meantime, I'm alone in the apartment. I said I didn't know anything. He said, "You slashed her." Then he looked at me over his head: "You look like a nice guy. Make it easy on yourself. Before I got to you, I planned to blow

[505]

off your head." He repeated again: "You're a nice guy. Do

yourself a favor." And I looked at him and I said, "I slashed her."

* * *

JUSTICE LANG'S VERDICT AND REARTICULATION OF HIS SUPPRESSION RULING

* * *

[601]

THE COURT: The Court makes the following findings and conclusions: The Court finds the People have established beyond a reasonable doubt that Thelma Staton was killed by means of cutting her throat in a homicidal fashion.

Evidence in this case strongly indicates that there was circumstantial evidence indicating a deteriorating relationship between Mr. Harris and Thelma Staton. The defendant is quite correct in stating that were it not for the confession, this Court could not find the defendant guilty beyond a reasonable doubt. And that, therefore, the confession, if believable, becomes the focal point of this case. We'll, of course, have to reiterate in determining the viability or the truthfulness or validity of the confession to the Huntley hearing.

With respect to the confession B, as the defendant calls it, or statement B, which is

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basically a written statement of the detective edited and signed by the defendant indicating in great detail the relationship between Mr. Harris and Miss Staton and the acknowledgement by him in great detail as to the events of both January 7th and January 11th, 1984, including correcting certain statement made by the officer.

That statement, contrary to what the defendant says, was in no way the product of the initial entry, which I found to be illegal as a violation of Paton [sic]. The record with respect to that entry and what occurred indicates that the officers at that point entered with probable cause to arrest

and, indeed, with a great deal of information that might have justified the conviction if that information had turned out to be depicted at trial as it was depicted to them. I'm of course referring to the purported statement which I believe was made which was not made at trial by the daughter to the effect that the defendant had keys to the locked bedroom from the outside.

In any event, the statement made to Officer Rivers at the time of the initial entry according to the testimony therein, it was perhaps no more

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than a minute long.

It basically, as I recall, indicated that he loved Miss Staton; that she was not a fit mother for her child and that he killed her by slitting her throat. That was basically the statement in such a brief fashion that Officer Rivers, who concededly takes very particular notes, had no records of this nor did the others hear it.

The statement, on the other hand, made to Officer Rivers at the station house an hour later, made no reference to any of that material other than the fact that he acknowledged killing her. There was no reference to "fit mother." There was no reference to "daughter."

So that in finding attenuation both then and now I find the statement at the time of the entry was minimal and was in no way the fruit—was in no way the seed from which the fruit of the second statement was borne. That statement stands on its own entirely independently, as I indicated before. The Paton [sic] violation was not the type of Paton [sic] violation which has been so often condemned by courts, to wit, an entry without probable cause at all.

Here there was probable cause to arrest and the arrest, therefore—the violation was a technical one, of not having the warrant. Not that

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I approve of that, but that the passage of an hours' time, the defendant having had drinks, according to the officer on his own behest; according to him, at their behest, in my view attenuated whatever minimal taint there was to the events in the apartment.

I cannot accept the defendant's version with respect to the coercive nature of the statement or that this statement was other than voluntary and true.

The defendant is convicted of murder in the second degree.

* * *

THE OPINIONS AND ORDER OF THE APPELLATE DIVISION

* * *

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Opinions and Order, Dated November 6, 1986

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BERNARD HARRIS, Appellant,—Judgment, Supreme Court, Bronx County (Irving Lang, J.), rendered on April 29, 1985, affirmed. Sandler, J. P., concurs in a memorandum with which Wallach, J., concurs; Asch, J., concurs in a separate memorandum with which Kassal, J., concurs; and Rosenberger, J., dissents in a memorandum, all as follows:

Sandler, J. P. (concurring).

It may be that the somewhat ambiguous hearing testimony would have supported a factual finding by the hearing court that the defendant was arrested under circumstances that did not violate *Payton* v. *New York* (445 US 573). I am unable to agree, however, that the hearing court's finding that such a violation occurred was erroneous as a matter of law or contrary to the weight of the evidence. Accordingly, the critical issue, in my view, is whether there was an adequate basis for the hearing court's further determination that there had been sufficient attenuation to justify the acceptance into evidence of the defendant's written station house statement given after a renewal of the *Miranda* rights.

Although the issue is a close one, and the dissenting opinion presents a cogent argument to the contrary, I am satisfied that there was an adequate basis for the trial court to conclude that the police station statement was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." (*Wong Sun* v. *United States*, 371 US 471, 486.)

Although *Brown* v. *Illinois* (422 US 590) is relevant to the issue presented, I do not agree that it is as clearly determinative of that issue as suggested in the dissenting opinion. There is a difference between the issue presented here and that addressed by the Supreme Court in *Brown* that surely has significance in the balancing process required in determining whether challenged evidence must be suppressed as an exploitation of constitutionally invalid police behavior.

Brown (supra) was concerned with a defendant who was arrested without probable cause and who, at the time of his arrest, could not have been arrested anywhere in a manner consistent with constitutional requirements, and as to whom an arrest warrant could not properly have been then issued. Given the fact that there was here probable cause to arrest the defendant, a finding not disputed in the dissenting opinion, we are confronted with an arrest that could have taken place lawfully anywhere except in the defendant's apartment. This major difference in the character of the underlying illegality surely has some relevance in determining whether or not the challenged statement represented an improper exploitation of the underlying illegal act.

Significantly, in *United States* v. *Johnson* (626 F2d 753, 759, *affd* 457 US 537), an important decision understandably relied on in the dissenting opinion, the Ninth Circuit rested its determination to suppress the station house statement on the conclusion that the defendant "[h]aving given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it". In this case, however, the testimony strongly indicates that the defendant was expecting the police to come, was relieved when they arrived at his apartment, and had made a clear prior decision to admit his guilt. Accordingly, there is strong support in the record for the conclusion that the defendant gave his written statement at the station house, not because he felt committed by what he had said at the apartment, but because of a considered decision made prior to the expected arrival of the police.

One other fact distinguishing this case from *Johnson* (*supra*) should be noted. *Johnson* involved an arrest of a person charged with a nonviolent crime. In this case, the police had substantial reason to believe that they were concerned with a dangerously violent person who had abducted and raped the deceased some four days before he killed her. Although the arrest cannot be justified as having occurred under exigent circumstances in the normal meaning of that term, it seems clear that the police were acting under the pressure of a sense of urgency that the defendant should be taken into custody as soon as possible.

Asch, J. (concurring).

Defendant's contentions that his arrest was not supported by probable cause and that his written confession, which was given after a *Miranda* warning, should have been suppressed are without merit.

Erika Jones, the daughter of murder victim Thelma Staton, reported to the police a conversation she had had with her mother prior to her death. Erika stated that her mother had told her that she had been kidnapped by the defendant, at knife point, from the home of her boyfriend, Herbert Stultz, and then raped by defendant four days before the murder. Staton's diary had an entry for that date to the same effect. Moreover, a friend and co-worker of the victim had informed the police that Staton had told her of the abduction. The police were also told that defendant had installed the lock on Staton's bedroom door. It had been locked from the outside after the crime and only defendant and the murder victim had keys. Staton's boyfriend, Stultz, told the police that a window had been broken in his apartment on the day of the abduction. Staton had refused to disclose the identity of the perpetrator to Stultz, out of concern for his safety. The day before she died, Staton told Stultz she was scared to death of defendant.

With this background of incriminating evidence, the police went to defendant's apartment. Defendant invited them in and told them he was glad they had come for him.

After being informed of his *Miranda* rights and told by Detective Rivers that they were there with respect to Staton's death, the defendant poured himself a glass of wine and admitted he had slit her throat with a knife. He was arrested and taken to the station house. As the hearing court found, there was ample probable cause for his arrest. About one hour later, he was again read his *Miranda* rights and he once more gave a statement to Detective Rivers. It was taken down by the officer and signed by defendant. In it, defendant admitted the facts of the crime in detail.

After the *Huntley* hearing, the court found that the police entry into the apartment without a warrant constituted a violation of the holding in *Payton* v. *New York* (445 US 573), and, therefore suppressed the confession given in the apartment. However, because of the passage of time between the first and second confessions and the rereading of the *Miranda* rights, the court found that there was an attenuation which removed the taint of the *Payton* violation. We find, however, based upon the uncontradicted evidence before the court, that the entry of the police into the apartment was legal and not in violation of the dictates of *Payton* v. *New York* (*supra*).

The testimony at the hearing was unequivocal that defendant voluntarily admitted the police officers, inviting them in and, in fact, even telling them he was "glad" they had come for him. He also told them, "Have a seat while I fix myself a glass of wine." In *Payton* (*supra*, at p 576), the United States Supreme Court held that "the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment * * * prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest". As noted, there was clearly consent on defendant's part to the police entry. Defendant's conduct in admitting the police and inviting them to sit down while he had a glass of wine negated any inference of coercion.

Even if the hearing court was correct in its determination that the initial arrest was illegal, the second written confession was not obtained by " 'exploitation of th[e] illegality' " but " 'by means sufficiently distinguishable to be purged of the primary taint' " (*Wong Sun* v. *United States*, 371 US 471, 488; *see also, People* v. *Rogers*, 52 NY2d 527). The hearing court, in any event, found, as we do, that any "taint" resulting from an illegal arrest was removed by the lapse of time between the statements and the rereading of the *Miranda* warnings before defendant made his second confession.

Brown v. *Illinois* (422 US 590), cited by the dissent, is inapposite, even assuming the illegality of the arrest. There, the Supreme Court held that the reading of the *Miranda* warnings by themselves would not per se break the causal connection between the illegality and the confesssion. Also, contrary to the facts of *Brown*, the arrest in this case was not made solely for questioning or investigation. The police had investigated the murder fully and had ample probable cause to arrest defendant at the time that they went to his apartment.

Rosenberger, J. (dissenting).

I dissent and would reverse the judgment appealed from and remand the matter to Supreme Court for a new trial.

Defendant was arrested in his apartment, without a warrant, by police officers who entered the apartment with drawn guns while another officer was at a window on the fire escape. Police officers and detectives had gone to the defendant's apartment. When there was no response to their knocking at the door, one of the officers went down the fire escape to the window of defendant's apartment. That officer was on the fire escape for two or three minutes. He had knocked on the window and said "Police". A detective at the door called out: "Police". The defendant then admitted the detectives at his door, who, as noted, had their guns drawn. (One of the officers, when asked, on cross-examination at the hearing, by the defendant, *pro se:* "Did you have my consent to be in that apartment?", responded "No".)

The police conceded that no attempt had been made to obtain a warrant for the defendant's arrest. It was also conceded that they would have "taken him into custody *for questioning*" (emphasis added) had he not wanted to talk to them. The defendant made inculpatory statements while in custody in the apartment.

Criminal Term correctly found that the defendant had submitted to police authority in admitting them to his apartment. The court suppressed the statements stating: "No more clear violation of *Peyton* [sic], in my view, could be established."

The defendant was then taken to the 44th Precinct where *Miranda* warnings were once again read to him and where he signed an inculpatory statement. This statement was made one hour after the unlawful arrest in the defendant's home. Thereafter, the defendant made a videotaped statement to an Assistant District Attorney. When asked by the Assistant District Attorney "Now that I have advised you of your rights, do you want to speak to me about the death of Thelma Staton?" The defendant responded: "Well, I really don't know what to say right now." The court suppressed the videotaped confession, finding no clear waiver of the defendant's right to remain silent. Having suppressed the statement made by the defendant in his apartment and the videotaped statement made by him to the Assistant District Attorney, the court nonetheless refused to suppress the written statement of the defendant finding "sufficient attenuation; the rights were given again." Presented for review on this appeal is this branch of the court's ruling on the motion.

Brown v. *Illinois* (422 US 590 [1975]) is instructive on, and in my view determinative of, the issue here involved. In that case, the defendant was arrested at the entrance to his apartment for questioning regarding a homicide. He was taken to the police station where he was informed of his rights under *Miranda* v. *Arizona* (384 US 436). About one hour after the arrest at his apartment he made an inculpatory statement. The Supreme Court of Illinois (56 Ill 2d 312, 317, 307 NE2d 356, 358) found the arrest to be unlawful,

but declined to suppress the station house statement, finding that the giving of the *Miranda* warnings "served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' (*Wong Sun* v. *United States*, 371 US 471, at 486.)" In reversing the Supreme Court of Illinois, Justice Blackmun wrote (422 US, at pp 602-604):

"If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis* v. *Mississippi*, 394 U. S. 721, 726-727 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to a 'form of words.' See *Mapp* v. *Ohio*, 367 U.S., at 648.

"It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover* v. *United States*, 384 U. S. 436, 496-497 (1966).

"While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or 'but for' rule. The petitioner himself professes not to demand so much. Tr. of Oral Arg.

12, 45, 47. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson* v. *Louisiana*, 406 U. S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun* v. *United States*, 371 U. S., at 491. The voluntariness of the statement is a threshold requirement. Cf. 18 U.S.C. § 3501. And the burden of showing admissibility rests, of course, on the prosecution."

In *United States* v. *Johnson* (626 F2d 753 [9th Cir 1980], *affd* 457 US 537 [1982]), the defendant was arrested in his home by agents with drawn guns. He was given *Miranda* warnings and agreed to cooperate. The defendant thereafter made a statement at a police station. The Ninth Circuit suppressed both statements, observing "Having given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it." (626 F2d, at p 759.)

In all cases in which consent of the defendant is at issue, the People have a heavy burden of showing the voluntariness of the alleged consent. (*People* v. *Whitehurst*, 25 NY2d 389, 391 [1969].) On a motion to suppress statements, the burden of proof is upon the People to prove admissibility beyond a reasonable doubt. (*People* v. *Huntley*, 15 NY2d 72, 78 [1965].)

In the instant case, Criminal Term properly suppressed the statement given by the defendant in his apartment on the grounds that the police officers should have obtained a warrant under *Payton* v. *New York* (445 US 573). There was no reasonable explanation for the failure to obtain a warrant.

Under existing law, an arrest warrant cannot be issued until an accusatory instrument has been filed (CPL art 120). Once an accusatory instrument has been filed a defendant may not be questioned in the absence of counsel. (*People* v. *Samuels*, 49 NY2d 218 [1980]; *People* v. *Settles*, 46 NY2d 154 [1978].) Quite possibly, the detectives may have felt it more expedient to arrest the defendant summarily, rather than seek a warrant, in light of the restrictions on questioning.

There was no significant intervening event between the defendant's initial statement, found by Criminal Term to be the result of his unlawful arrest, and the written statement which is the subject of this appeal.

THE OPINIONS OF THE NEW YORK COURT OF APPEALS

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COURT OF APPEALS
STATE OF NEW YORK
1 No. 137

The People of the State of New York, Respondent,
v Bernard Harris, Appellant.
Argued September 13, 1988; decided October 20, 1988

SIMONS, J.

Defendant has been convicted after trial of murder, second degree, for the stabbing death of his former girlfriend. The evidence against him included a statement he made in the police station approximately an hour after the police arrested him in his apartment without a warrant. Defendant contends that the statement should have been suppressed because it was obtained in violation of constitutional guarantees against illegal searches and seizures (*see*, NY Const, art I, §12; US Const, 4th Amend). The People contend that the entry and arrest were consensual but maintain that even if illegal under *Payton* v. *New York* (445 US 573), the confession was admissible because it was sufficiently attenuated from the illegality. This is particularly so, they claim, because at the time of the arrest the police were acting on probable cause. The trial court found the entry and arrest were not consensual and that finding, undisturbed by the Appellate Division, is binding on this court. Accordingly, the issue before us is limited to whether the causal connection between the illegality and the confession was attenuated.

Ordinarily, questions of attenuation are mixed questions of law and fact that we may review only to ascertain whether there is support in the record for the determination of the

lower courts (*see, People* v *Borges*, 69 NY2d 1031, 1033; *People* v *Conyers*, 68 NY2d 982, 984; *People* v *Bastidas*, 67 NY2d 1006, 1007). In this case however, we must look to the legal sufficiency of the evidence, particularly the weight to be attributed to probable cause in cases involving *Payton* violations. We conclude defendant's statement should have been suppressed on Fourth Amendment grounds and therefore reverse the order of the Appellate Division and order a new trial.

On January 11, 1984 the police found the dead body of Thelma Staton in her apartment and investigation quickly developed probable cause to believe that defendant Bernard Harris was the killer. Five days later, on January 16, 1984, three police officers went to his apartment, without an arrest warrant, to take him into custody. The officers knocked on the apartment door but there was no response so one officer went down a fire escape to the window of the apartment, knocked on it, and said "Police". As he did so, the other two officers, with guns drawn and at their side, again knocked on the front door. Defendant looked out the peephole of the door and one officer displayed his badge. Defendant then opened the front door and allowed the officers to enter. One of the officers testified that as he did so defendant stated that he was glad the police had come for him. The police then read defendant his *Miranda* rights. He acknowledged that he understood them and stated that he was willing to answer their questions. The officers told defendant that he was suspected of murdering Thelma Staton and the officers testified that after they did so defendant poured himself a glass of wine and then admitted that he had killed the victim with a knife. He was arrested, taken to the station house where he was again given *Miranda* warnings, and made the written inculpatory statement to the police which was received at trial and is the subject of this appeal. Subsequently, defendant was given *Miranda* warnings a third time, just prior to the making of a videotaped interview with an Assistant District Attorney. However, this time when asked whether he wanted to speak about the death of Thelma Staton, defendant answered that he was tired and stated: "Well, I

really don't know what to say right now . . . I have said all I can say." Nonetheless, a full statement was videotaped in which defendant again admitted that he had murdered Staton.

After a *Huntley* hearing, Supreme Court suppressed the first statement, given in defendant's apartment, as the product of an illegal arrest and it suppressed the third videotaped statement given to the Assistant District Attorney, because it was taken after defendant had stated that he did not wish to be questioned further. It denied the motion to suppress the second statement finding the *Miranda* warnings had been repeated and defendant waived his rights before making the statement. The court's findings, undisturbed by the Appellate Division, included findings that the police had probable cause to arrest defendant at the time they entered his apartment, that they went there with the intention of making a warrantless arrest in his home and that defendant opened the door and permitted the police to enter because he was submitting to their authority. The trial court concluded that "no clearer violation" of *Payton* v *New York* (455 US 573, *supra*) could be established.

Defendant was convicted after a bench trial and the judgment was affirmed by a divided Appellate Division. Justice Sandler, with whom Justice Wallach concurred, agreed with the Supreme Court's determination that the police had made an illegal arrest but nevertheless found attenuation based upon the existence of probable cause. He also found that defendant gave his written statement at the station house not because he felt committed by what he had said at his apartment but because he had made a clear decision to admit his guilt prior to the illegal entry of the police.[1] The trial court made no such finding and Justice

[1] The dissent relies on similar reasoning, but the weakness of the argument is demonstrated by contrasting it with *People* v *Emanuel* (98 Mich App 163, 295 NW2d 875). In *Emanuel*, the People introduced evidence that before his illegal arrest defendant had voluntarily told two police officers that he had information about the crime. The officers told him to go to the police station and report it but when he did not appear, two other officers sought him out and asked to talk with him. Defendant's first words on meeting them were that he had "intended" to talk to them. Under these circumstances, the court could hardly be faulted for taking

(footnote continued on next page)

Sandler cited no evidence in the record to support his conclusion.

Justice Asch, joined by Justice Kassal, concurred in affirmance in a separate writing. He found that defendant had consented to the police entry but held that, assuming a *Payton* violation, any "taint" resulting from the illegal arrest was removed by the lapse of time between the initial confession and the rereading of the *Miranda* warnings before defendant made his second confession.

Justice Rosenberger dissented and voted to reverse the judgment and remand the matter for a new trial. He concluded that there was no significant intervening event between the defendant's initial statement in his apartment, found by the hearing court to be the result of his unlawful arrest, and the written statement given at the police station.

In *Payton* v *New York* (445 US 573, *supra*), the Supreme Court held that arrest was a species of seizure and that a warrantless, nonconsensual entry into a suspect's home to make a routine felony arrest violates the Fourth Amendment. Noting that the Fourth Amendment protects individual privacy in a number of settings, it pointed out that in

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(footnote continued from preceding page)

defendant's words at face value. The proof of intent in *Emanuel* is far different from the police officers' testimony concerning defendant's statements in this case. In *Emanuel* there was evidence of antecedent circumstances, i.e., events transpiring prior to the illegal arrest, as well as defendant's unambiguous statement when the police arrived. The only evidence supporting voluntariness in the present case is the testimony of police officers who conducted the illegal arrest and there is no indication that the trial court accepted it. Indeed, the court explicitly found that defendant's actions were in submission to the authority of two police officers at the front door, displaying a badge and with guns drawn, and a third at the window of his apartment.

In response to the dissent's statement that the courts "apparently" held the entry into defendant's home was not consensual, the trial court found, and its findings were undisturbed by the Appellate Division, that "no clearer violation" of *Payton* could be established. Nor were the police present to "investigate". The trial court found that the police went to defendant's apartment to make a warrantless arrest and labeled the claim that they were only there to investigate "nonsense". Thus, the dissent, while rejecting the *Brown* test for measuring the taint, relies on a "sensitive assessment" of facts, as it finds them, which are contrary to the findings of the courts below.

none of them is the zone of privacy more clearly defined than in "the unambiguous physical dimensions of an individual's home" (445 US, at 589, *supra*). Accordingly, it held that the fruits of illegal entries must be suppressed even though the police might have probable cause to conduct a search or effectuate an arrest outside the home without a warrant. Under the rule of *Payton*, this arrest was clearly illegal, as the courts below found, and it only remains to determine the consequences of the illegal police conduct.

In *Wong Sun* v *United States* (371 US 471), the Supreme Court first considered whether a confession, otherwise admissible, must be suppressed if it is the "fruit" of an antecedent illegal arrest. The court held that verbal evidence "which derives so immediately from an unlawful entry and an unauthorized arrest" is no less the product of official illegality than the more common physical, tangible evidence obtained as a direct result of an unlawful invasion. Therefore, the exclusionary rule operates to bar from trial any verbal statements obtained as a direct result of an unlawful invasion (*id.*, at 485). In *Brown* v *Illinois* (422 US 590), the Supreme Court clarified the *Wong Sun* decision and addressed the proper effect that should be given to *Miranda* warnings administered after an illegal arrest.

In *Brown*, defendant was unlawfully arrested and taken to a police station where some two hours later, after being given proper *Miranda* warnings, he made the incriminating statements used against him at trial. Justice Blackmun, speaking for the court, noted the Fourth and Fifth Amendment concerns in the case and stated that for the causal chain between the illegal arrest and the subsequent statements to be broken *Wong Sun* requires not merely that the statement meet the Fifth Amendment's standards but also requires "consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendement" (*id.*, at 602). The court reasoned that if *Miranda* warnings, by themselves, were sufficient to attenuate the taint of an unconstitutional arrest, any incentive to avoid Fourth Amendment violations would be substantially

impaired and the exclusionary rule diluted. Thus, the court held that *Miranda* warnings in and of themselves do not purge the taint of the original illegality. The court rejected a "but for" standard that would require suppression of all statements made after police illegality, however, and held that the question of whether a confession is the product of a free will under *Wong Sun* must be answered by reviewing the facts of each case. Three of the factors to be considered, the court said, are the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. The fact that the statement was freely made after the proper reading of *Miranda* warnings is necessary for the purposes of the Fifth Amendment, but this type of "voluntariness" is merely a threshold requirement in Fourth Amendment analysis for "if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached" (*Dunaway* v *New York*, 442 US 200, 217).

In the present case, defendant was given *Miranda* warnings and freely gave his statements at the apartment and at the police station and thus the Fifth Amendment threshold requirement has been satisfied. But because defendant was illegally arrested in his home, the court must determine, by applying the factors delineated in *Brown*, whether the statement given in the police station was sufficiently purged of the taint of this Fourth Amendment *Payton* violation or the causal connection between the illegality and the confession remains. The trial court's conclusion of attenuation rested on its finding that *Miranda* warnings had been repeated before the statement was made. The two opinions for affirmance in the Appellate Division based their finding of attenuation on the repetition of the *Miranda* warnings, the lapse of time between the arrest and the station house statement and the benign nature of the police conduct because of the existence of probable cause. The courts below did not identify any intervening event, other than the *Miranda* warnings, between the arrest and the making of the statement at the police station.

Considering first temporal proximity, defendant's written statement was given approximately one hour after the illegal arrest, a considerably shorter period than the time which elapsed between the illegal arrest and the suppressed statement in *Brown* v *Illinois* (*supra*). The People argue that the shortness of the interval between the arrest and the statement in the police station and the officers' testimony concerning defendant's conduct in the apartment indicates the confession was an act of free will formed before the police entry. It can be argued with equal force that the statement was given by defendant in submission to the authority of the police who had illegally entered his home and arrested him. In short, the temporal relationship between the illegal arrest and the statement is, at best, ambiguous. Standing alone, it cannot serve to attenuate the illegality and it becomes important to look for events occurring within the interval between arrest and confession (*see*, *Dunaway* v *New York*, 442 US 200, 220 [Stevens, J., concurring], *supra*).

In this case, the short time period and the continuous police presence with defendant from the time he was arrested until the time he gave his statement, without any legally significant intervening event, indicate that the station house statement was no less a product of the Fourth Amendment violation than was the statement defendant made in his apartment which the courts below suppressed. Reading defendant his *Miranda* rights again may have cured the Fifth Amendment violation but, as *Brown* v *Illinois (supra)* held, standing alone it could not attenuate the link between the Fourth Amendment violation and the statement. Having just given a statement in his apartment which incriminated him in the crime, defendant had already committed himself and "there was little incentive to withhold a repetition of it" (*United States* v *Johnson*, 626 F2d 753, 759, *affd* 457 US 537). Thus, there is no evidence relating to the first two *Brown* factors which would break the link between the illegal arrest and the incriminating statement. More importantly the third factor, the purpose and flagrancy of the official misconduct, militates against a finding of attenuation. Not

all evidence connected with police misconduct must be suppressed. The principal purpose of the exclusionary rule is deterrence and at some point the causal relationship between the evidence and the illegality became so attenuated that suppression of the evidence exacts a far too heavy price and the remedy of exclusion no longer justifies its cost. The "taint" doctrine must be extended far enough to serve the purpose of deterrence, however, and thus the purpose and flagrancy of the police conduct becomes a legitimate and important factor in the equation. If the impetus for the illegality has been a purposeful violation of the Fourth Amendment more is required to attenuate the causal chain between it and the confession. But it should be noted that the converse is not true. An otherwise inadmissible confession may not be admitted into evidence simply because there has been no showing of purposeful misconduct. Misconduct is a factor, not a controlling factor, and while the severity of the police illegality may fortify a finding that strong deterrence is required, attenuation is not established by showing that the police conduct was undertaken in good faith (*Taylor* v *Alabama*, 457 US 687; *see generally*, 4 La Fave, Search and Seizure § 11.4[b], at 397-398 [2d ed]).

In the case before us, the trial court found the police went to defendant's apartment to arrest him and, as the police conceded, if defendant refused to talk to them there they intended to take him into custody for questioning. Nevertheless, they made no attempt to obtain a warrant although five days had elapsed between the killing and the arrest and they had developed evidence of probable cause early in their investigation. Indeed, one of the officers testified that it was department policy not to get warrants before making arrests in the home. From this statement a reasonable inference can be drawn, as the dissent below did, that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession (*see*, 124 AD2d 472, 478). Thus, the police illegality was knowing and intentional, in the language of *Brown* (*supra*, at 605) it "had a quality of purposefulness", and the linkage between the

illegality and the confession is clearly established. Moreover, these illegal efforts continued after defendant's detention because the Assistant District Attorney subsequently obtained a third statement from him unlawfully.

The analysis highlights the distinction between this case and cases such as *People* v *Conyers* (68 NY2d 982) and *Rawlings* v *Kentucky* (448 US 98) on which the People and the dissent rely. In *Conyers* the arrest was not only free of flagrant and purposeful misconduct, it was legal when made. Given the appropriateness of police conduct at the time and the fact that defendant's statement was made after he had been left alone for two hours, we affirmed the Appellate Division's factual finding of attenuation. In *Rawlings* defendant was detained for 45 minutes while two police officers went to obtain a warrant. The Supreme Court cautioned that under strict custodial conditions such a short lapse of time might not purge the taint of an illegal arrest. However, in the case before it the court denied suppression because the arrest was made in the "congenial" atmosphere of defendant's home and his statement was made "spontaneously", to avoid implicating a friend in the crime (*id.*, at 108-109). The dissent also relies on *People* v *Rogers* (52 NY2d 527, *cert denied* 454 US 898) and the Appellate Division's decision in *People* v *Matos* (93 AD2d 772). Both cases involve situations in which defendant was confronted with incriminating evidence independently obtained and the courts held that the intervening events broke the causal chain between the illegality and confession. The *Rogers* case is also distinguishable because of the elapsed time, the nature of the police conduct, and the additional intervening factor that defendant had talked with his brother during his three-hour detention. In the case before us, the police deliberately made an illegal arrest, according to the practice of the department, to obtain a confession of defendant. None of the courts below found any intervening event sufficient to attenuate that illegality, nor do we.

Two Justices of the Appellate Division distinguished this case because the police had probable cause to arrest the

defendant. They reasoned that the defendant's arrest could have taken place lawfully anywhere except in his apartment and that this "major difference in the character of the underlying illegality" (124 AD2d, at 473) supported a determination that there had been sufficient attenuation to purge the primary taint of the illegal arrest. Judge Titone's concurring opinion states the distinction intended, that the wrong in *Payton* cases such as this lies not in the arrest, "but in the unlawful *entry* into a dwelling without proper judicial authorization".[2] The argument is contrary to the express language of *Payton's* holding that "a 'basic principle of Fourth Amendment law' [is] that searches and seizures inside a home without a warrant are presumptively unreasonable" notwithstanding probable cause (445 US 573, 586, *supra*). We implicitly rejected it in *Conyers*. Indeed, we applied that interpretation earlier in *Riddick* v *New York* (445 US 573), the companion case of *People* v *Payton*. In *Riddick*, the police made a warrantless felony arrest based upon probable cause in defendant's apartment and, as an incident of that arrest, seized tangible evidence. Upon remand from the Supreme Court, we suppressed the evidence without comment and ordered a new trial (*People* v *Riddick*, 51 NY2d 764; *cf., People* v *Payton*, 51 NY2d 169 [remitted for a new hearing on exigent circumstances]). Had the arrest been legal we would have held the evidence properly obtained as incident to a legal arrest or remitted for a determination on the question. Implicit in our decision was a holding that because of the illegal entry, and notwithstanding probable cause for the arrest, the evidence was illegally acquired.

Indeed, the issue is no longer open for discussion. *United States* v *Johnson* (626 F2d 753, *affd* 457 US 537, *supra*),

[2] This view has been accepted by some courts (*see, State* v *Thomas*, 405 So 2d 462 [Fla App]; *Thompson* v *State*, 248 Ga 343, 285 SE2d 685). The effort to separate the two events and hold that the confession need not be suppressed because the arrest is legal and has been described by a prominent authority as a "gross misapplication" of the inevitable discovery rule (*see*, 4 La Fave, Search and Seizure § 11.4[b], at 397).

presented factual circumstances almost identical to the present appeal. The police had entered defendant's apartment and arrested him without a warrant although they possessed probable cause. He confessed at the apartment and again at the police station. The Circuit Court of Appeals, applying *Payton*, held the arrest was illegal and, after applying the rule in *Brown* v *Illinois* (*supra*), it suppressed both confessions. On appeal to the Supreme Court, the People argued that the statements should not be suppressed because the rule in *Payton* should not be applied retroactively. The Supreme Court, without questioning the application of *Payton* by the Circuit Court, affirmed its determination that the arrest was illegal and that the confessions must be suppressed. That holding controls here.

Finally it should be noted that as a matter of policy, deterring *Payton* violations by suppressing confessions causally related to them is no less important than deterring investigative detentions or street arrests made on less than probable cause.[3] All are entitled to the same level of scrutiny and evidence obtained as a result of such misconduct must be suppressed unless the taint of the illegality has become sufficiently attenuated.

Accordingly, the order of the Appellate Division should be reversed, defendant's statement suppressed and a new trial ordered.

[3] As to the dissent's argument that deterrence is not required in *Payton* cases because the police will not make warrantless arrests at the home and risk having confessions suppressed, the simple answer is that they did so here and apparently do so routinely in this police department.

As to the dissent's argument that the majority is suppressing because there was probable cause, the position of the majority is that suppression is required because there was an illegal arrest, notwithstanding probable cause, and the causal relationship between the illegality and the evidence obtained was not attenuated.

TITONE, J. (concurring). I concur in the majority's result and reasoning on constraint of our recent decision in *People* v *Conyers* (68 NY2d 982). In that case, the court, for the first time and without further discussion, utilized the factors delineated in *Brown* v *Illinois* (422 US 590; *see, also, Rawlings* v *Kentucky*, 448 US 98) to determine whether statements made by a defendant arrested in violation of the rule enunciated in *Payton* v *New York* (445 US 573) were sufficiently attenuated from the "illegality" to permit their admission into evidence. Despite my concurrence, here and in *Conyers* (*supra*), I continue to have serious misgivings about the unquestioning use of the *Brown* analysis in cases involving *Payton* violations.[1]

As a threshold matter, before attenuation is considered, the courts must first determine whether "the challenged evidence is in some sense the product of illegal governmental activity" *(United States* v *Crews*, 445 US 463, 471). In cases such as *Brown* v *Illinois* (*supra*) and its progeny, an affirmative answer to that preliminary question may be assumed, since the "illegality" is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement. In these cases, the "challenged evidence"—i.e., the post arrest confession—is unquestionably "the product of [the] illegal government activity"—i.e., the wrongful detention. In cases involving *Payton* violations, in contrast, the initial causal relationship between the illegality and the subsequently obtained statement is more dubious. Unlike in *Brown* (*supra*), it is not the detention itself that is wrongful, but rather the manner in which the arrest was carried out. Although we sometimes use legal shorthand and refer to the police action as an "illegal arrest," the true wrong in *Payton* cases lies not in the arrest but in the unlawful *entry* into a

[1] Contrary to the majority's assertion and the views of one commentator *(see,* majority opn, at 623, n2), the misgivings I express here are far more substantial than a simple "misapplication" of the "inevitable discovery doctrine."

dwelling without proper judicial authorization.[2] Whether there is a sufficient causal relationship between this unlawful *entry* and the police's subsequent obtaining of a statement is a matter that should be explored before the court embarks on the more traditional attenuation inquiry (*Crews* v *United States, supra*).[3] It was apparently this missing step that troubled Justice Sandler at the Appellate Division (*see*, 124 AD2d 472 [Sandler, J., concurring]). In my view, the

[2] The precise holding of the Supreme Court in *Payton* was not that the arrest *per se* was unlawful, but rather than an otherwise improper warrantless entry into the home cannot be justified by the sovereign's common-law right to effect an arrest without a warrant, even when the arrest is supported by probable cause. This reading of *Payton* is evident both from Justice Stevens' characterization of the question presented (445 US 573, 574 ["the constitutionality of * * * statutes that authorize police officers to enter a private residence without a warrant * * * to make a routine felony arrest"]) and from the court's rationale (*id.*, at 589-590): "But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home * * * In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

The language quoted by the majority—that " 'a "basic principle of Fourth Amendment law" [is] that searches and seizures *inside a home* without a warrant are presumptively unreasonable' " (majority opn, at 623-624, quoting *Payton* v *New York, supra*, at 586 [emphasis supplied])—is certainly not to the contrary.

[3] In *People* v *Riddick* (51 NY2d 764), we ordered suppression of physical evidence found in a dresser drawer while the police were unlawfully on the premises without a warrant. In that case, there was a logical causative relationship between the unlawful entry and the discovery of the physical evidence on the premises. Thus, *Riddick* is not inconsistent with the view that it is the warrantless entry, and not the arrest, that *Payton* proscribes. In contrast, there is no such logical causative relationship where, as here, the evidence to be suppressed is a confession made at the police station after the in-home arrest has been completed. Further, contrary to the majority's suggestion (majority opn, at 624), the Supreme Court's holding in *United States* v *Johnson* (457 US 537) is not controlling because there is no indication that the court, which was concerned with the retroactivity issue, even considered the attenuation problem that the case presented (*see, People* v *Ford*, 62 NY2d 275, 281, n).

absence of guidance from this Court on the issue will continue to lead to analytical problems in future *Payton* cases.

CHIEF JUDGE WACHTLER, J. (dissenting). There is no sound basis in law or public policy—indeed it would seem to be against public policy—for this court to suppress a confession which was wholly the product of a defendant's free will, unaffected by any police illegality. The majority does so in this case, ostensibly because the application of factors found relevant in *Brown* v *Illinois* (422 US 590), indicate that a second confession was not sufficiently attenuated from a prior confession. Nowhere, however, in the majority opinion, or in the Appellate Division concurring opinions, or in the trial court opinion, are there any facts from which it can be reasonably inferred that either the first confession or the second confession was the product of anything other than defendant's independent and self-motivated decision to confess to killing his girlfriend. I do not believe that the majority's purported establishment of a connection, in the abstract, between two completely voluntary confessions provides a basis for suppression here.

The facts are unusual but uncomplicated. Defendant's girlfriend, Thelma Staton, was killed when her throat was cut with a knife. The police, with probable cause to believe that defendant did the killing, but without an arrest warrant, went to question defendant at his home. The police knocked at the door, and, after some delay, defendant came to the door and asked "who is it." A detective held his badge up to the peephole, and defendant then opened the door, stating "I'm glad you came for me." Defendant was then read the *Miranda* warnings, which he acknowledged that he understood. He then invited the police officers to sit down, and said that he was going to fix himself a glass of wine. One detective then sat down, and told defendant that he wanted to talk to him about the death of Thelma Staton. After pouring the wine, defendant stated that he loved Thelma Staton, but that she was not bringing up her child "right," and that he had killed Thelma Staton by cutting her throat with a knife.

Defendant was then arrested and taken to the police station. The *Miranda* warnings were again read to him, and he indicated that he understood them. Defendant then dictated a confession to a police officer, who wrote it down as defendant spoke. When the confession was completed, defendant read it, and made one change by crossing out a section which stated that he had taken the murder weapon with him after the crime. This was changed to read that defendant had thrown the knife out of the window immediately after killing the victim. After this change was made, defendant signed the confession.

These facts were found by the trial court, were undisturbed by the Appellate Division, and, finding support in the record, now bind this Court.

On these facts, the two lower courts found a *Payton* violation, apparently holding that defendant did not sufficiently consent to the entry of the police into his home (*see, Payton* v *New York*, 445 US 573). I agree with the concurrers at the Appellate Division that this conclusion is questionable. Indeed, although the trial court did, as the majority notes, denominate the *Payton* issue "clear", it nevertheless appears that the lower courts did not come to grips with the potentially dispositive issue of consent. But, even if there was no consent, and thus a *Payton* violation, I am at a loss to understand what legal principle necessitates suppression of the defendant's confessions.

Initially, I note that this question is reviewable by us. Both lower courts held without analysis that the first confession was suppressible. However, simply put, when using the correct legal standard together with the facts found by those courts this conclusion is without basis (Cohen and Karger, Powers of the New York Court of Appeals §§ 114, 115 [rev ed]). Indeed, the majority exercises its power to review the suppression of the second confession on this very basis.

The fundamental principle here, repeated by the United States Supreme Court and this court so often as to be axiomatic, is that "it has never been enough to show that evidence must be suppressed simply because it is discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements" (*People* v *Rogers*, 52 NY2d 527, 535, *cert denied* 454 US 898; *see, People* v *Conyers*, 68 NY2d 982, 983; *People* v *Arnau*, 58 NY2d 27, 32; *Rawlings* v *Kentucky*, 448 US 98; *Brown* v *Illinois*, 422 US 590, *supra*). We have consistently rejected, and should reject again today, the notion that "a person illegally detained be forever granted immunity from prosecution or conviction" (*People* v *Rogers*, *supra*, at 531). Instead, our judgment should be anchored upon the settled rule that defendant's statements may be admissible against him at trial provided that the statements "were acts of free will unaffected by any illegality in the initial detention" (*Rawlings* v *Kentucky*, *supra*, at 110).

Applying these principles in *Brown* v *Illinois* (*supra*, at 603), the Supreme Court held that when an illegal arrest has been followed by a confession, the question becomes whether the confession was actively produced by the arrest, or by some independent force. In *Brown* the court stated that relevant factors to analyze this question were the presence of *Miranda* warnings, temporal proximity of the arrest and confession, intervening circumstances, and the flagrancy of police misconduct (*id.*, at 603-604). But these are only factors, none of which is dispositive, to be used as tools to assess the independence of a confession from any police illegality; mathematical summation of values accorded to each factor is no substitute for sensitive assessment of the facts of each case, and the reaching of a well founded conclusion whether a police illegality actively caused a confession.

The case law bears this out; where it is clear that a confession is the product of a force independent from an allegedly unlawful detention, the confession is admissible. For example, in *People* v *Rogers* (*supra*), a confession caused by

defendant being confronted with legally obtained evidence was admissible; in *Rawlings* v *Kentucky* (*supra*), a confession caused by the police discovering physical evidence in a purse was admissible; and in *People* v *Matos* (93 AD2d 772), the defendant's statements caused by the knowledge that his girlfriend told the police "about the rape" were admissible.

Similarly, on the facts in this record, defendant's confessions manifestly were not the product of a *Payton* violation. Defendant was expecting the arrival of the police, as shown by his reaction that he was "glad" when they got there. Nor can it reasonably be inferred that defendant was feeling any police coercion as he fixed himself a glass of wine to make himself more comfortable, and then explained how he had both loved his girlfriend and killed her. These are not the statements and actions of a man reacting to police coercion or illegality; on the contrary, these facts portray a man who quite independently had decided to confess before the police arrived, and whose decision, therefore, was formed independently from any illegal police conduct. As a result, neither the first confession, nor the second confession which followed, were in any way actively produced by any police illegality.

Thus the case law does not require suppression here. My disagreement with the majority, however, goes beyond this. I take issue with the assertion that deterrence of *Payton* violations requires suppression in this case; indeed, I believe that suppressing this defendant's freely and independently given confessions will, in net effect, encourage police conduct posing greater threats than are presented in this case.

As to the deterrence argument: the majority asserts that if we do not suppress here we will encourage *Payton* violations. In reality, however, use of defendant's confessions will not have this effect. Here the defendant welcomed the police, sipped wine and confessed. If we did not suppress here the rule would remain, as it has long been, that there will be suppression if the confession is actively produced by police illegality. Given this fact, the deterrence benefit furthered by this case eludes me. Armed with probable cause to arrest a

suspected murderer, surely the police will not forego obtaining a warrant with hopes of meeting a congenial host, and thereby circumventing *Brown* v *Illinois*. Nor should we be worried that the police will choose to run the risk that, if this oddity does not occur, the whole police investigation will be jeopardized, including not only confessions obtained, but all physical evidence discovered as well.

Even more distressing, this decision will encourage more intrusive and dangerous police conduct than that which the majority erroneously believes it needs to deter. The majority suppresses here not on the usual grounds of the lack of probable cause, but, ironically, because there *was* probable cause. The majority's rationale turns directly on that finding: it reasons that because there was probable cause there should have been a warrant, but because there was no warrant, suppression is required.

But what is missed here is that if the police had been conducting a routine investigation, without probable cause, defendant's confessions would be admissible. Thus in the name of deterrence, for the sake of suppressing a manifestly independent confession, the majority encourages the questioning of suspects before probable cause is obtained.

Where deterrence is unnecessary, and where defendant's confessions were not the product of police illegality, there should be no suppression. I therefore dissent.

* * * *

Judges Kaye, Alexander, Titone and Hancock, Jr., concur with Judge Simons; Judge Titone concurs in a separate opinion; Chief Judge Wachtler dissents and votes to affirm in another opinion in which Judge Bellacosa concurs.

Order reversed, etc.

PETITIONER'S

BRIEF

No. 88-1000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

BERNARD HARRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether the New York Court of Appeals erroneously construed the Fourth Amendment by holding that the warrantless arrest of a murder suspect in his home, although based on probable cause, by itself, requires the exclusion from evidence of his voluntary confession, given with full comprehension of the *Miranda* warnings about one hour later at a police precinct.

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OPINIONS BELOW

The opinion of the New York Court of Appeals (J.A. 39-56) is reported at 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988). The opinion of the Supreme Court of the State of New York, Appellate Division, First Department (J.A. 30-38), is reported at 124 A.D.2d 472, 507 N.Y.S.2d 823 (1st Dept. 1986). The unreported opinions of the trial and hearing court, which were delivered on the record, are reproduced in the joint appendix (J.A. 19-21, 27-29).

JURISDICTION

The decision of the New York Court of Appeals was entered on October 20, 1988. The Court granted the petition for certiorari on April 17, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides, in part:

> Section 1 "... nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

STATEMENT OF THE CASE

The Facts At The Suppression Hearing

At the commencement of the pre-trial suppression hearing [*see* New York Criminal Procedure Law § 710.60], respondent Harris, who represented himself *pro se* with the assistance of an attorney as his legal adivsor, explicitly put forth his claim that his warrantless arrest in his apartment required the suppression of his two confessions to the police and his videotaped confession to an assistant district attorney (J.A. 1-2; R. 4-5, 24).[1] The following pertinent facts were elicited at the hearing:

At about 5:20 p.m. on January 11, 1984, New York City Police Detective Willrick Rivers went to a Bronx County apartment and found the body of Thelma Staton lying nude across her bed, her throat slit. The door to the bedroom was locked (R. 30-32, 59). Detective Rivers interviewed the victim's fourteen-year-old daughter. She told him that, four days before, Ms. Staton's boyfriend, "Jedi," had abducted Ms. Staton from another apartment at knifepoint and then had raped her. Only the deceased and Jedi had keys to her bedroom. Ms. Staton's daughter informed the detective that

[1] Numerals preceded by J.A. refer to the pages of the Joint Appendix; numerals preceded by R. refer to the record.

"Jedi" lived at apartment 3F, 960 Sheridan Avenue, in The Bronx (J.A. 3-5; R. 33-35, 60-61). A search of the deceased's apartment revealed her diary, which under the date January 7, 1984, stated in the deceased's handwriting, "Jedi enter Herbie's apartment through window; abducted me." The diary also included a summons for harassment against respondent Harris tucked among the pages (J.A. 4; R. 36-37). Interviews with the deceased's friends confirmed that she was scared to death of Jedi, and a check with the mailman and the superintendent of respondent's apartment building confirmed that Jedi was in fact Bernard Harris and that he lived alone in apartment 3F (J.A. 4-5; R. 38-40, 71-72).

Then on January 16, 1984, at about 6:30 p.m., Detective Rivers, accompanied by Detective John McCarthy and Police Officer John Egan, went to respondent's apartment. They had no warrant for respondent's arrest (J.A. 8-11; R. 64, 166). Police Officer Egan stationed himself on the fire escape outside respondent's window while Detectives Rivers and McCarthy knocked loudly on his door. When respondent asked who was there, Detective Rivers responded, "Police," and put his shield to the peephole. Though the detectives had their guns in hand, they were not visible to respondent (J.A. 11-14; R. 40-42, 69, 113, 149-50, 153-54, 181-82). Detective Rivers testified that he intended to take respondent "into custody for questioning," but Detective McCarthy testified that if respondent had not opened the door, he "would have turned around and walked out" (J.A. 6-8; R. 67-68, 165).

Any potential disagreement about their course of action was mooted, however, because respondent opened the door, invited the detectives in, and said, "I'm glad you came for me" (J.A. 11-12, 15; R. 42-43, 150-51). The detectives holstered their guns and entered respondent's apartment. Inside, Detective Rivers read respondent the *Miranda* rights from a printed card (J.A. 13, 15; R. 43-46, 74, 151, 154). Respondent acknowledged that he understood his rights and

asked the police "to have a seat while he fixed himself a glass of wine" (J.A. 16; R. 45-47, 75, 151). When informed that the police were there regarding the death of Thelma Staton, respondent stated that he loved Ms. Staton, but that she was not a fit mother for her child, and that he had killed her by slitting her throat with a knife. He said nothing else at the time (J.A. 15-16; R. 47-48, 77).

The detectives then told respondent he was under arrest and took him to the local precinct, where respondent was again advised of his *Miranda* rights; respondent said that he was willing to speak, and made a second statement that Detective Rivers wrote down as respondent spoke. In this lengthier statement, respondent related that he loved Ms. Staton, but that when he learned that she was "fooling around" with Herbie, an ex-boyfriend, he went to Herbie's apartment, broke in, and offered Ms. Staton an opportunity to go home with him, which she accepted. They left, made love, and spent the day together. Later that night, however, Ms. Staton called Harris and told him that she intended to give Harris' phone number and address to Herbie. Then, on Wednesday, January 11, he went to Ms. Staton's apartment, ordered her to undress, and said, "Okay now, tell me the truth." When she lied, they struggled and he cut her throat with a knife. He then locked the bedroom door and left. Mr. Harris read the written statement, corrected it to reflect that he picked up the knife from Ms. Staton's kitchen rather than that he had brought it with him, initialed the correction, and signed and dated it at 7:45 p.m., January 16, 1984 (J.A. 16-19, 22-26; R. 48, 50-52, 350-52).

Later that evening at the precinct, respondent was readvised of his *Miranda* rights by Assistant District Attorney Theodore Weathers. When asked if he wanted to speak, respondent stated, "I really don't know what to say right now... at this moment I've said all that I can say." Assistant District Attorney Weathers then took a video-taped statement from respondent (R. 191, 194-94A, 195, 197).

The Hearing Court's Decision

The hearing court ruled that the police had ample probable cause to believe respondent was the killer based upon the evidence of motive, his prior violent act toward the deceased, and the fact that only he and the deceased had keys to her locked bedroom door (J.A. 19; R. 222). When the police went to respondent's apartment, the court concluded, their purpose was to take him into custody, and "properly so, that is with probable cause for the crime," but it concluded that when respondent opened the door, he submitted to the police authority. Thus, it reasoned:

> No more clear violation of Peyton (sic), in my view, could be established. Therefore, the statement, albeit voluntary within the generic meaning of the term, and after the appropriate rights had been given by the officer in the house, is suppressed. With respect to the statement in the stationhouse, I find there was a sufficient attenuation; the rights were given again. I find that the action of taking him into custody at the house, was not the primary cause of his giving the statement, but rather was independently given by him voluntarily. Therefore, the statement which [respondent] signed, given to Detective Rivers, with appropriate warnings and appropriate waivers, is admitted into evidence

(J.A. 19-20; R. 223-24).

The court, however, suppressed the statement to the assistant district attorney finding that respondent's desire to cut off further interrogation had not been scrupulously honored (R. 224-25).

The Trial, Verdict, and Rearticulation of the Suppression Ruling

Respondent, still representing himself *pro se*, was tried before the hearing judge, sitting without a jury at respondent's request. Respondent's precinct confession was received in evidence (J.A. 24-26; R. 350-52). Respondent testified in substance that he was intimidated by the police and had merely signed what they wrote (R. 508-11). The court found respondent guilty of murder in the second degree (R. 604). In the course of rendering its verdict, the

court rearticulated its ruling admitting respondent's confession.[2] It found that the precinct confession was "in no way the product of the initial entry." The court found attenuation from the facts that the initial statement in the apartment that respondent killed Ms. Staton because she was an unfit mother was no more than a minute long, and that the longer written statement at the precinct made no reference to any of the prior statements except that it acknowledged that respondent had killed her:

> So that in finding attenuation both then and now I find the statement at the time of the entry was minimal and was in no way the fruit—was in no way the seed from which the fruit of the second statement was borne. That statement stands on its own entirely independently, as I indicated before. The Paton (sic) violation was not the type of Paton (sic) violation which has been so often condemned by courts, to wit, an entry without probable cause at all. Here there was probable cause to arrest and the arrest, therefore—the violation was a technical one, of not having the warrant. Not that I approve of that, but that the passage of an hours' time, [respondent] having had drinks, according to the officer at his own behest; according to him, at their behest, in my view attenuated whatever minimal taint there was to the events in the apartment. I cannot accept [respondent's] version with respect to the coercive nature of the statement or that this statement was other than voluntary and true

(J.A. 27-29; R. 602-04).

The Decision of the Appellate Division

Pro se, respondent appealed to the Supreme Court of the State of New York, Appellate Division, First Judicial Department. On November 6, 1986, a divided panel of that intermediate appellate court affirmed the judgment of conviction, although the justices could not agree on a rationale. Two justices found a *Payton* violation but agreed that the

[2] New York requires the trial fact-finder to again decide the question of the voluntariness of a confession notwithstanding the pre-trial determination. *See* New York Criminal Procedure Law § 60.45; *People v. Graham*, 55 N.Y.2d 144, 432 N.E.2d 790, 447 N.Y.S.2d 918 (1982).

statement at the precinct was attenuated by the facts that respondent had expected the police to come, that he was relieved when they arrived at his apartment, and that he had made a clear prior decision to admit his guilt. "Accordingly, there is strong support in the record for the conclusion that [respondent] gave his written statement at the stationhouse, not because he felt committed by what he said at the apartment, but because of a considered decision made prior to the expected arrival of the police." Additionally, those justices pointed to the violent nature of the crime, which required a prompt arrest, and noted that because there was probable cause, respondent could have been lawfully arrested anywhere but in his apartment. "This major difference in the character of underlying illegality surely has some relevance in determining whether or not the challenged statement represented an improper exploitation of the underlying illegal act" (J.A. 30-31).

Two justices found, "based upon the uncontradicted evidence before the court," that respondent had consented to the police entry, and hence that there was no *Payton* violation. Respondent's "... conduct in admitting the police and inviting them to sit down while he had a glass of wine negated any inference of coercion." Even assuming a *Payton* violation, those justices reasoned that the precinct statement was attenuated by the lapse of time and the rereading of the *Miranda* warnings. Those justices found *Brown v. Illinois*, 422 U.S. 590 (1975), inapposite, even assuming the illegality of the arrest, because the arrest was not made solely for the purpose of interrogation. "The police had investigated the matter fully and had ample probable cause to arrest [respondent] at the time they went to his apartment" (J.A. 33-34).

The dissenting justice believed that *Brown v. Illinois* determined the case and would have reversed the conviction.

The Decision of the New York Court of Appeals

Respondent, again *pro se*, obtained permission to appeal further to the New York Court of Appeals. By a 4-1-2 vote, the New York Court of Appeals reversed the order of the Appellate Division. The majority of that court concluded that the arrest was clearly illegal under the rule of *Payton*,

and that because of the short interval between the apartment and precinct confessions and the continuous police presence, "there is no evidence relating to the first two *Brown* factors which would break the link between the illegal arrest and the incriminating statement" (J.A. 43, 45). The court also found that the "policy" of the police in failing to get a warrant supported the inference that the police were trying to avoid restrictions on questioning suspects.[3] Accordingly, it concluded that the illegality was knowing and intentional and had a "quality of purposefulness" within the meaning of *Brown*. For precedent, the majority relied on *United States v. Johnson*, 457 U.S. 537 (1982), which it felt controlling because this Court affirmed the suppression there without questioning the application of *Payton* by the circuit court. "As a matter of policy," it concluded, "deterring *Payton* violations by suppressing confessions causally related to them is no less important than deterring investigative detentions or street arrests on less than probable cause. All are entitled to the same level of scrutiny and evidence obtained as a result of such misconduct must be suppressed unless the taint of the illegality has become sufficiently attenuated" (J.A. 46, 48-49).

Judge Titone concurred in the result upon constraint of a prior decision of that court, but he expressed serious misgivings about the unquestioning use of a *Brown* analysis in cases involving *Payton* violations. Judge Titone reasoned that the evil *Payton* addressed was not the illegality of the arrest, but rather the *entry* to make the arrest. Hence, he had difficulty in finding a nexus between the unlawful entry and the subsequent statement (J.A. 50-52).

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[3] Under New York law, the police must file an accusatory instrument in order to obtain an arrest warrant. New York Criminal Procedure Law § 120.20. Once any accusatory instrument has been filed, the New York Court of Appeals has held that under state law, police may not interrogate an accused in the absence of counsel. *People v. Samuels*, 49 N.Y. 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980). *Compare Patterson v. Illinois*, U.S. , 101 L.Ed.2d 261, 108 S. Ct. 2389 (1988).

Two dissenters would have affirmed. They believed that the precinct statement was the independent product of respondent's free will and desire to confess, and that the finding of a *Payton* violation was questionable because the lower court did not come to grips with the question of respondent's consent to the entry. With regard to the majority's concern about deterring illegal police conduct, the dissenters believed the rule announced would have the effect of encouraging the police to question suspects on less than probable cause, for if the police had gone to the apartment without probable cause, the confession would have been admissible (J.A. 52-53, 55-56).

SUMMARY OF ARGUMENT

This Court has never held that a criminal suspect's voluntary confession must always be excluded from evidence solely because the police had no warrant for his arrest when they seized him. In *Brown v. Illinois*, 422 U.S. 590 (1975), in *Dunaway v. New York*, 442 U.S. 200 (1979), and in *Taylor v. Alabama*, 457 U.S. 687 (1982), this Court held that the *Miranda* warnings *per se* will not attenuate a voluntary confession when the police lack probable cause to seize a suspect. In those cases, however, suppression was required because there was no constitutional basis on which to hold the suspects in custody until after they confessed. Hence, the confessions were the fruits of unconstitutional detention. The State submits that while the attenuation analysis employed there may be helpful in deciding the instant question, those cases do not control here because the police conduct was based upon probable cause. Also because the warrantless entry into respondent's home, on the present facts, was such a *de minimis* intrusion upon any expectation of privacy that society considers reasonable, the purpose of the exclusionary rule will not be served by the suppression of his voluntary confession to murder made at the police precinct. In support of this position, the State advances four interrelated arguments. Although it is certainly possible that in practice one or more of these may be found to operate

better in combination, for purposes of analytical clarity we would set them forth as follows:

A. The State believes that where probable cause to arrest exists, and the police illegality is limited to a failure to obtain an arrest warrant, the effect of the *Miranda* warnings themselves should be sufficient to attenuate a voluntary confession from any intrusion upon respondent's reasonable expectation of privacy. The rule of *Brown, Dunaway*, and *Taylor*, which is based upon the rationale that the confessions were the product of an unreasonable seizure of the suspects' persons that continued until they confessed, has no application where the police have probable cause and, outside the home, may reasonably seize and interrogate the suspect without a warrant. *See United States v. Watson*, 423 U.S. 411 (1976), *United States v. Santana*, 427 U.S. 38 (1976). Therefore, since the seizure of respondent's person was based upon probable cause, no unreasonable seizure of his person led to his continued custody and to his confession in the precinct. Hence, *Brown, Dunaway*, and *Taylor* are not controlling, and the New York Court of Appeals erred in relying on them.

B. Assuming that the warrantless *entry* into respondent's home violated the rule of *Payton v. New York*, 445 U.S. 573 (1980) (an assumption the State contests, *infra*), the precinct confession should be admissible because it was not made *in* respondent's home and thus was not seized while the *Payton* violation continued. In *Payton*, 445 U.S., at 592 n.34, *United States v. Crews*, 445 U.S. 463, 474 (1980), and *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), this Court held that the body of the defendant may not be suppressed as the fruit of an unlawful detention. From this it follows that evidence seized outside the home from a lawfully-detained suspect should not be suppressed either. *Payton* vindicates the privacy interest in one's home. It has no application to evidence seized outside the home.

C. Assuming that the proper framework for considering taint flowing from all *Payton* violations to confessions is indeed the rule of *Brown, Dunaway*, and *Taylor*, the New York Court of Appeals improperly applied that standard. Here, the precinct confession was so attenuated from the

Fourth Amendment violation that it was properly admitted at trial. (1) The police conduct was not flagrant and was not purposefully designed to violate the constitution. While the police could have obtained an arrest warrant, nothing in the constitution required them to do so before they attempted to obtain a voluntary and consensual statement from respondent. Also, unlike *Payton* and *Brown*, where the police forcibly broke into the suspects' homes, and unlike *Riddick v. New York*, 445 U.S. 573 (1980) and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), where the police seized the suspects from their beds, the entry here was cordial, so cordial in fact that respondent felt sufficiently at ease to pour himself a glass of wine before he spoke. (2) There is a significant intervening factor in respondent's independent desire to confess in full as evidenced by the detail of his precinct confession, which did not repeat the sparse facts of the first confession. By this time respondent clearly wanted the complete truth to be told. (3) The temporal proximity between the arrest and the confession is unlike that of *Brown, Dunaway*, and *Taylor*. In each case, a single confession followed an illegal arrest. Here, respondent apparently invited the police in and confessed voluntarily. Only then was he arrested, and the precinct confession occurred about an hour later. Under these circumstances, the ambiguous factor of the temporal proximity of the second confession to the arrest should not be a ground for suppressing it.

D. Finally, the facts demonstrate that there was no *Payton* violation in this case. Hence, there was no taint flowing from any police illegality that needed to be attenuated. When the police knocked on respondent's door and identified themselves, respondent invited them in and said he was glad they had come for him. After hearing his *Miranda* warnings, respondent poured himself a glass of wine, and then told them that he had killed Ms. Staton because she was an unfit mother. After this statement, respondent was arrested and taken to the precinct where he signed a written confession to the effect that he had killed Ms. Staton because she had been fooling around with an old boyfriend and had lied to him. Thus, as suggested by the concurrence at the Appellate Division, the police entry was

consensual, and respondent's pre-existing, independent desire to confess was unaffected by the benign treatment afforded him. Accordingly, the New York Court of Appeals wrongfully suppressed it.

ARGUMENT

POINT

THE NEW YORK COURT OF APPEALS ERRONEOUSLY CONSTRUED THE FOURTH AMENDMENT TO REQUIRE THE EXCLUSION FROM EVIDENCE OF A MURDER SUSPECT'S VOLUNTARY CONFESSION, GIVEN WITH FULL COMPREHENSION OF THE *MIRANDA* WARNINGS AT A POLICE PRECINCT, SOLELY BECAUSE, ABOUT ONE HOUR BEFORE, THE POLICE, ACTING ON PROBABLE CAUSE, HAD ARRESTED HIM IN HIS HOME WITHOUT FIRST OBTAINING A WARRANT FOR HIS ARREST.

This Court has never held that the Fourth Amendment requires that a criminal suspect's voluntary confession must always be excluded from evidence solely because the police had no warrant for his arrest when they seized him. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 491 (1963); *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Dunaway v. New York*, 442 U.S. 200, 217-18 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Taylor v. Alabama*, 457 U.S. 687, 692-93 (1982); *Illinois v. Gates*, 462 U.S. 213, 256 (1983) (White, J., concurring). Here, however, the New York Court of Appeals construed this Court's precedents and the Fourth Amendment[4] to require the exclusion of a voluntary confession, made with full comprehension of the *Miranda* rights,

[4] Although the New York Court of Appeals based its decision on the Fourth Amendment and the prior decisions of this Court, it also cited Article I § 12 of the New York State Constitution once as it summarized defendant's arguments for reversal. This single reference to the state constitution in an opinion which otherwise relied exclusively on Fourth Amendment jurisprudence cannot constitute an independent and adequate state ground that would preclude this Court from granting this petition. *See, e.g., Michigan v. Chesternut*, 486 U.S. , 100 L.Ed.2d

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solely because the police had neglected to obtain an arrest warrant before they went to respondent's home to talk to him about the murder of his girlfriend, which they had probable cause to believe he had committed.

In the State's opinion, the New York Court of Appeals erred on four fronts: (1) it applied the test of *Brown, Dunaway*, and *Taylor* to a case where the presence of both probable cause to arrest and *Miranda* warnings makes that standard inapplicable; (2) it determined that the mere entry into respondent's home in violation of *Payton* necessarily tainted not only the statement made *inside* his home but also the later statement made *outside* his home; (3) it failed to recognize that respondent's confession was attenuated from the entry into his home even under *Brown, Dunaway*, and *Taylor* analysis; and (4) it failed to recognize that both statements were the product of respondent's independent decision to confess, formed prior to his meeting with the police, as evidenced by his desire to admit the police to his home and to confess to them.

A. Because Respondent Was Held In the Precinct On the Basis Of Probable Cause, His Confession Was Not The Product Of An Unreasonable Seizure.

In *Brown v. Illinois*, 422 U.S. 590 (1975), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982), this Court held that the primary deterrent purpose of the exclusionary rule is well served by the suppression of precinct confessions that result from unlawful police

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565, 570 n.3, 108 S. Ct. 1975, 1978 n.3 (1988); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The conclusion that the New York Court of Appeals did not rest its decision here on state grounds is buttressed by the fact that when that court decides a case upon independent and adequate state grounds it expressly says so. *See, e.g., O'Neill v. Oakgrove Construction*, 71 N.Y.2d 521, 524, 523 N.E.2d 277, 278, 528 N.Y.S.2d 1, 2 (1988); *Matter of Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 65-66, 510 N.E.2d 325, 328, 517 N.Y.S.2d 456, 459 (1987); *People v. Stith*, 69 N.Y.2d 313, 316 n., 506 N.E.2d 911, 912 n., 514 N.Y.S.2d 201, 202 (1987) n.

seizures of suspects in the hope "that something might turn up." *Brown*, 422 U.S., at 605; *Dunaway*, 442 U.S., at 216; *Taylor*, 457 U.S., at 691. Rejecting any application of a balancing test to determine whether seizures on less than probable cause are "unreasonable" within the meaning of the Fourth Amendment, this Court stated in *Dunaway*, 442 U.S., at 213-14:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.... For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

In each of these cases, the vice that tainted the evidence was the holding of the suspect in "[i]ndefinite involuntary incommunicado detention...", *United States v. Montoya de Hernandez*, 473 U.S. 531, 550 (1985) (Brennan, J., dissenting), for the purpose of interrogation *until* he confessed, that is, until the police suspicion blossomed into probable cause. For this reason, in *Brown v. Illinois*, 422 U.S., at 602-03, this Court held that the *Miranda* warnings, which render a statement voluntary for purposes of the Fifth Amendment, cannot *per se* expiate the taint of an unreasonable seizure which continues until the suspect confesses. *Accord Taylor v. Alabama*, 457 U.S., at 692-93; *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (exclusion of statements required if they result from illegal detention).

Here, however, as recognized by all the courts below, respondent's detention at the precinct was based upon ample probable cause.[5] Accordingly, once respondent left the confines of his home, his detention by the police was not unreasonable, since a police officer possessed of probable cause

[5] This finding appears incontestable. After the discovery of Ms. Staton's body in her locked bedroom, throat slit, Ms. Staton's daughter told the police that her mother had been abducted and raped at knifepoint four days previously by respondent, her former boyfriend, who had the only

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may make a warrantless seizure of a suspect anywhere outside the home. *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38, 42-43 (1976). As a result, the illegality of custodial interrogation on less than probable cause addressed in *Brown*, *Dunaway*, and *Taylor* is not present in this case. From this it follows that there was no Fourth Amendment violation in respondent's detention at the precinct and respondent's written confession should have been admitted. *See Colorado v. Spring*, 479 U.S. 564, 571-72 (1987) ("A confession cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous").

The fact that in this case the police had probable cause makes an application of the *Brown* rule inappropriate for a number of practical reasons as well. First, the presence of probable cause ordinarily makes the case conceptually different in the eyes of the police. Unlike the police officers in *Brown*, *Dunaway*, and *Taylor*, who confronted ambiguous situations and hoped someone would confess and solve their mysteries for them, the police officer who has probable cause has already solved his mystery and will focus his energies on finding the suspect. Thus, once the arrest is made, the police officer with probable cause has no need to wait indefinitely before taking further steps with the arrestee. He processes the case at the precinct and then brings the defendant to central booking and arraignment. Should the suspect desire to confess, as was the case here, the police officer will listen of course and perhaps record it, but the essential point is that there is no incentive to wait for that moment, because from the police point of view the case is solved without it. In contrast, the police officer who lacks probable cause has a strong incentive—indeed has no alternative—but to wait until the suspect ultimately confesses before bringing him to court. Without the confession his case will be dismissed as

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other key to her bedroom. Moreover, the victim's diary confirmed the abduction in her own handwriting. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 292-93 (1973).

soon as the court reviews it. Thus, there is a strong police incentive to delay the arraignment of the suspect when there is no probable cause, but there is virtually no incentive to unnecessarily delay the arraignment when probable cause exists. Therefore, the exclusionary rule's purpose of removing the police incentive to disregard the constitution would not be served by applying it to cases where the suspect confesses after he has been arrested upon probable cause. Second, in this case the nature of the underlying illegality is qualitatively different from that in *Brown, Dunaway*, and *Taylor*. Here, there was a single, brief warrantless entry into one place rather than a continuous illegal detention which lasted indefinitely until the confession. Accordingly, the force of the *Miranda* warnings, which represent an intervening act specifically allowing the suspect to ask for a free professional defender against the State, should be held to be sufficient in and of themselves to cure the taint of the warrantless intrusion. Here the illegality that required suppression in *Brown, Dunaway*, and *Taylor* is simply not present.[6]

Here, however, the New York Court of Appeals erred in automatically applying the "*Brown* exclusionary rule" without considering the limited scope of *Brown's* holding:

> We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun always* purge the taint of an illegal arrest.

[6] Nothing stated in the above paragraph is intended to suggest that it is entirely proper for the police to detain suspects indefinitely at the precinct even if they do have probable cause. Statement suppression or other legal consequences may properly ensue if, for example, the rules regarding prompt arraignment are ignored (*e.g.* New York Criminal Procedure Law § 140.27), or if a prisoner is denied food, sleep or access to counsel if requested at the precinct. In these kinds of cases suppression may rightfully follow on Fifth Amendment or Sixth Amendment grounds. Rather the point is that these independent safeguards are sufficient to protect the rights of an arrestee detained upon probable cause. Hence, there is no need to look to *Brown* to deter unlawful activity where the detention is based upon probable cause.

Brown v. Illinois, 422 U.S., at 605 (emphasis added).

Rather, the New York Court of Appeals appears to have taken the equally extreme opposite view, that *Miranda* warnings cannot purge the taint of an illegal arrest regardless of the nature of the underlying illegality.[7] This rigid view of *Brown* has the effect of eliminating the rationale of *Dunaway* that detentions for interrogation upon probable cause are reasonable and without Fourth Amendment taint, and it serves no purpose but to unreasonably hinder society's legitimate interest in using totally voluntary statements as evidence of guilt in criminal trials.

This rigid view of *Brown* also ignores the fact that in the course of this Court's extensive body of Fourth Amendment jurisprudence, it has frequently recognized that different "illegalities" lead to different kinds of "taint," which differently affect the manner in which the balance is struck between the deterrence of unlawful behavior and the need to admit evidence which is otherwise truthful and probative. For example, where the illegality is a defect in the issuance of a search warrant, relied upon in good faith, the taint may require no exclusion at all. *United States v. Leon*, 468 U.S. 897 (1984). And where an illegal arrest or search leads to an identification or testimony by a live witness, this Court has noted that it would serve no purpose to apply the rules which govern illegally seized physical evidence. *United States v. Crews*, 445 U.S. 463, 470-73 (1980); *United States v. Ceccolini*, 435 U.S. 268, 276-77 (1978). Plainly then, *Brown* does not state the only rule to be applied when the taint touches otherwise lawfully acquired verbal evidence.

[7] That court's view may be based, in part, on its erroneous assumption that this Court's opinion in *United States v. Johnson*, 457 U.S. 537 (1982) answered the question presented in this case. *People v. Harris*, 72 N.Y.2d, at 624, 532 N.E.2d, at 1235, 536 N.Y.S.2d, at 7 (J.A.). However, as this Court noted in *Johnson*, 457 U.S., at 541 n.6, it did not pass on this question because the government had conceded the point.

Accordingly, the State urges this Court to define the standards applicable to *post-Miranda* confessions made by suspects detained upon probable cause, and to hold that when detention is pursuant to probable cause, the *Miranda* warnings can and should attenuate in most cases a totally voluntary confession from the taint of a warrantless arrest in the suspect's home.

B. A *Payton* Violation, If One Occurred In This Case, Requires Suppression Of Any Evidence Seized In The Home: *Payton* Should Not Be Extended To Require The Suppression Of A Voluntary Confession Made Outside The Home.

In the previous section, we have noted that when a warrantless arrest in violation of *Payton*, but upon probable cause, ultimately leads to a voluntary confession, the presence of *Miranda* warnings should attenuate the confession from the predicate illegality. Here, we make a related argument—that the scope of *Payton's* protection is such that it should be limited to suppression of evidence found in that home, and that if the evidence in question was otherwise properly taken outside of the home, it should be admissible. This Court has consistently held that the exclusionary rule is not a personal constitutional right of an aggrieved party, but is a remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). *Accord Illinois v. Krull*, 480 U.S., at 368-69 (O'Connor, J., dissenting); *Segura v. United States*, 468 U.S. 796, 804 (1984); *I.N.S. v. Lopez—Mendoza*, 468 U.S. 1032, 1043 (1984). Here the Fourth Amendment interest at stake is the physical entry of the home, "the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972). *Accord Oliver v. United States*, 466 U.S. 170, 178 (1984); *United States v. Karo*, 468 U.S. 705, 714-15 (1984).

This is the interest that *Payton* vindicates, and, as this Court made clear in *Payton*, the exclusionary rule will apply

to any evidence seized inside the home, such as the first confession in this case. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant." *Payton v. New York*, 445 U.S., at 586-87 (footnote omitted). This Court has consistently recognized the distinction between evidence seized in the home and evidence seized outside the home. *E.g., Michigan v. Clifford*, 464 U.S. 287, 299 (1984) (evidence seized in house suppressed, evidence seized in driveway admitted); *compare United States v. Knotts*, 460 U.S. 276, 282 (1983) (electronic monitoring evidence of can outside house admissible) *with United States v. Karo*, 468 U.S., at 714-16 (electronic monitoring evidence of can inside house suppressed); *United States v. Place*, 462 U.S. 696, 701 (1983); *Texas v. Brown*, 460 U.S. 730, 741-42 (1983) (plurality opinion) (seizure of property in plain view outside of house is presumptively reasonable). Of equal importance to the resolution of the question presented by this case is *Payton's* recognition that the person of the defendant is not "evidence" that may be suppressed as a consequence of a warrantless entry. *Payton v. New York*, 445 U.S., at 592 n.34. *Accord United States v. Crews*, 445 U.S. 463, 474 (1980); *I.N.S. v. Lopez-Mendoza*, 468 U.S., at 1039 (body of defendant never suppressible "even if it is conceded that an unlawful arrest, search or interrogation occurred"); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (custodial arrest of a suspect based on probable cause is reasonable intrusion under the Fourth Amendment).

Hence, the Court's precedents make clear that the requirement of a warrant to arrest inside the home is not designed to protect the person of the defendant from an arrest based on probable cause, *e.g., United States v. Santana*, 427 U.S. 38, 42 (1976), but to protect the privacy of his home against warrantless entries and seizures of evidence. Under this analysis, if a *Payton* violation occurred here, the New York courts were correct in suppressing respondent's confession made in his home because the warrantless entry continued

until that statement was "seized." However, when respondent was taken outside the apartment, the illegality of the warrantless entry ceased.

Accordingly, an application of the exclusionary rule to any evidence seized from his person outside his apartment, for example, his fingerprints or fingernail scrapings, or from an intervening act of his intellect, like his consent to a search of his car, would not vindicate the purpose of the Fourth Amendment. *See Hayes v. Florida*, 470 U.S. 811, 816-17 (1985) (detention outside of home based upon probable cause for purpose of seizing fingerprints would be permissible; entry into house based upon probable cause for purpose of seizing fingerprints would be impermissible); *Cupp v. Murphy*, 412 U.S. 291, 294-97 (1973) (fingernail scrapings admissible where police had probable cause but no warrant); *United States v. Watson*, 423 U.S., at 424 (since arrest was legal, consent to search of car not product of an illegal arrest); *United States v. Ceccolini*, 435 U.S. 268, 276 (1978) (live witnesses including defendants are not the same as physical evidence for purposes of taint; the degree of free will exercised by the witness is relevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application).

This is the point that Judge Titone made in his concurring opinion in this case (J.A. 50-51) and, in the State's opinion, the majority of the New York Court of Appeals erred in ignoring this distinction. Simply put, the mere fact that the circumstances of the arrest violated a distinct concern for the Fourth Amendment's Warrant Clause, which unambiguously begins and ends at the threshold of the home, should have no logical or jurisprudential impact upon the distinct policy of the second clause of the Fourth Amendment, which allows reasonable detention upon probable cause outside the home for the purpose of interrogation. *United States v. Robinson*, 414 U.S., at 235.

In the Fifth Amendment context, in *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court has already rejected what would appear to have been a potential contrary argument. There, the police arrested Elstad pursuant to a warrant and secured a statement in his home without informing him of his

Miranda rights. This violation in the home, however, did not require suppression, as tainted, of a later precinct confession given after Elstad received the *Miranda* warnings. The State believes that the same result should be reached here and requests this Court to hold that a taint consisting solely of an entry into the home in violation of the Warrant Clause ends for all purposes once the police are no longer in the home. Thus, this taint cannot invalidate a voluntary confession by a suspect made outside the home while the suspect is reasonably being detained in lawful custody based upon probable cause that existed before the warrantless entry.

Further, a finding by this Court that probable cause serves to eliminate any Fourth Amendment interest that would bar the use of a voluntary confession made outside the home notwithstanding a *Payton* violation would, in the State's opinion, serve the salutary purpose of creating a "bright line" rule that would aid in eliminating some of "the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence." *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in part and dissenting in part). Pursuant to such a rule, any evidence "seized" inside the home area, including a confession, would presumptively be inadmissible,[8] while anything seized outside that area would be presumptively admissible.

Last term, in *Arizona v. Roberson*, U.S. , 100 L.Ed.2d 704, 713-14, 108 S. Ct. 2093, 2095 (1988), this Court again emphasized the virtues of a bright-line rule in cases involving confessions, and—the State submits—it should do so again here. Probable cause, although perhaps somewhat amorphous at its boundaries, is a familiar concept

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[8] There are always extraordinary situations, and one might speculate, for example, that if a defendant confronts the police inside his apartment and, shouting out a confession, shoots an officer, both his statements and the bullet recovered from the officer's body might be held admissible as "spontaneous" or "arising out of an independent, intervening act." Conversely, if the police make a forcible entry in the home and drag a protesting occupant just over the threshold before taking an otherwise voluntary confession, perhaps suppression should result.

to law enforcement personnel and one that has been relatively well defined by centuries of precedent. *Dunaway*, 422 U.S., at 213-14.

Thus, the State is requesting this Court to hold that *Payton* does not apply when the suspect's statement was made outside the home. The State believes that this rule will give the lower courts, prosecutors, and police the bright-line guidance they need to ensure that the Fourth Amendment's protection of the sanctity of the home is preserved, and ensure that exceedingly probative evidence of guilt remains available for use at trial. The State urges this Court to adopt this bright-line rule and to reject the contrary analysis of the Fourth Amendment employed by the New York Court of Appeals.

C. Assuming That The Police Violated *Payton* And Further Assuming That The Potential Taint of Such a Violation Extends Beyond The Confines Of The Home, Respondent's Precinct Confession Was Nevertheless Sufficiently Attenuated To Be Admissible Under Traditional *Brown* Analysis.

Previously, we have demonstrated that the scope of potential "taint" arising out of violations of the *Payton* warrant requirement should be judged differently from the familiar standards of *Brown, Dunaway,* and *Taylor.* In this section, we will demonstrate that if the rule of those cases is properly applied to the facts here, suppression should be denied, and that the New York Court of Appeals was incorrect in its contrary conclusion. In *Brown*, this Court delineated three factors for determining attenuation: (1) the purpose and flagrancy of the official misconduct; (2) the presence of any intervening circumstances; and (3) the temporal proximity of the arrest and confession. The State submits that a proper analysis of the facts of this case in light of the *Brown* factors leads inexorably to the conclusion that the precinct confession was attenuated from the entry into respondent's home.

First, for much the same reasons as previously noted, the police behavior here was by no means "flagrant," as a comparison of this behavior with the behavior addressed in this Court's controlling precedents plainly reveals. In *Brown*, the police, acting without probable cause and indeed without any firm indication that Brown was the murderer, *Brown v. Illinois*, 422 U.S., at 592 n.1, broke into Brown's home, searched it, and then surrounded him at gunpoint as he entered. In *Payton*, the police used crowbars to break into Payton's apartment. And, in *Riddick v. New York*, 445 U.S., at 578, and in *Welsh v. Wisconsin*, 466 U.S. 740, 743 (1984), the police roused the suspects out of their beds in a state of undress. Here, by contrast, the police behavior was, to say the least, "more or less courteous." *See Rawlings v. Kentucky*, 448 U.S. 98, 108 (1980). The police knocked on respondent's door. They did not enter until respondent invited them in, saying he was glad to see them, and when they entered they immediately informed respondent of his *Miranda* rights. Nothing occurred in the apartment to change this cordial atmosphere. Indeed, the police allowed respondent to pour himself a glass of wine and make himself comfortable before they began even to discuss the homicide. Finally, respondent was not subjected to any form of constraint until *after* he admitted that he had slit Ms. Staton's throat. Thus, by no stretch of the imagination can the police behavior here be termed flagrant within the meaning of *Brown v. Illinois*, where the police conduct has been described as "particularly egregious." *Taylor v. Alabama*, 457 U.S. 687, 698 (1982) (O'Connor, J., dissenting). Rather, these facts are much closer to those of *Rawlings* and do "not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of [respondent's] statements." *Rawlings v. Kentucky*, 448 U.S., at 110.

Nor may the police conduct be termed purposeful, that is, intended to avoid constitutional strictures or calculated to cause surprise, fright, and confusion within the meaning of *Brown v. Illinois*, 422 U.S., at 605. First, unlike the police in *Brown*, who could not reasonably believe they were acting in accordance with the Fourth Amendment, [*see I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1060 (1984) (White, J., dissenting)], and unlike *Dunaway*, where probable cause was concededly absent, *Dunaway v. New York*, 442 U.S., at 203, 207, here the police had probable cause to believe that respondent was the murderer. *See Illinois v. Gates*

462 U.S. 213, 260 (1983) (White, J., concurring) (deterrent value of exclusionary rule most effective when probable cause is lacking).

Nor can it be said that the police acted unreasonably in going to respondent's apartment without an arrest warrant for the purpose of speaking to him. As this Court recognized in *Schneckloth v. Bustamonte*, 412 U.S. 218, 230 (1973), "[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes" (citing *People v. Michael*, 45 Cal.2d 751, 754, 290 P.2d 852, 854 [1955] with approval). Here, as well, the police acted perfectly reasonably when they accepted respondent's invitation to come into his apartment, for nothing occurred at the doorstep which would have led a reasonable person to believe that respondent's statement that he was glad that they had come for him was anything other than the invitation to enter that it appeared to be. *See Maryland v. Garrison*, 480 U.S. 79, 85 (1987) ("we must judge the constitutionality of [police] conduct in the light of the information available to them at the time they acted."); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) ("The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"); *Florida v. Royer*, 460 U.S. 491, 517 (1983) (Blackmun, J., dissenting) (refusal to consent to search might require *Dunaway* suppression).

Finally, it bears reemphasis that the police did not arrest respondent, or having holstered their guns (J.A. 13), make any intimidating showing that respondent would be seized until *after* respondent first confessed to the homicide. Thus, since a reasonable person would not have believed that he was in custody or about to be in custody until the moment he confessed (*see Michigan v. Chesternut*, 486 U.S. , 100 L.Ed.2d 565, 572, 108 S. Ct. 1975, 1979 [1988]), and since, absent intimidating circumstances, questioning is not necessarily detention for Fourth Amendment purposes (*I.N.S. v. Delgado*, 466 U.S. 210, 216 [1984]), there was no search or seizure for Fourth Amendment purposes until *after* respondent confessed. For this reason, the concern raised by the dissenters in *Oregon v. Elstad*, 470 U.S. 298, 337 (1985)

(Brennan, J., dissenting), that the *Miranda* warnings do not inform a suspect of his right to be free from unlawful custody is not implicated here. Simply put, respondent was not in custody, lawful or unlawful, until he confessed.

Accordingly, the State submits that on no view of the facts can the police be said to have purposefully set out to avoid the Fourth Amendment's warrant requirement in order to secure an illegal advantage. Some comment must be made, however, about the inference drawn by the dissenter at the Appellate Division and mentioned by the majority of the New York Court of Appeals, that the police conduct here had a quality of purposefulness because the New York City Police Department has a policy of not obtaining warrants before arresting suspects in their homes in order to avoid state restrictions on questioning until the police have strengthened their case by securing a confession.[9]

First, Detective Rivers' testimony that it was "customary" [not "policy" (J.A. 10)] not to obtain warrants does not speak for the New York City Police Department since he is not a policy making official (*see, e.g., Pembauer v. Cincinnati*, 475 U.S. 469, 479-80 [1986]). The policy of the police department in these matters is promulgated by the Office of the Deputy Commissioner-Legal Matters. On June 6, 1980, the Deputy Commissioner published a Legal Bureau Bulletin which announced that department policy is to abide by the *Payton* decision and provided that the New York City police cannot enter the home or residence of a suspect simply to make a routine arrest unless: (1) the officer can set forth facts indicating that exigent circumstances exist; (2) the officer has consent; or (3) the officer has an arrest warrant. Thus, the

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[9] These restrictions are based upon a state constitutional rule that the authorities may not question a suspect in the absence of his attorney once the criminal action has commenced. *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980). Under New York Criminal Procedure Law section 120.20, an arrest warrant may not issue until the criminal action has commenced by the filing of an accusatory instrument. *Compare Patterson v. Illinois*, U.S. , 101 L.Ed.2d 261, 108 S. Ct. 2389 (1988).

policy of the New York City Police Department is emphatically contrary to the testimony of Detective Rivers. Second, Detective Rivers' testimony as to the department's custom was also at odds with that of his partner, Detective McCarthy, who would have left if respondent had not invited them in (J.A. 8). Hence, the inference drawn as to department policy is not firmly rooted in reality.

Third, even if the police purposefully delayed commencing a formal action in order to strengthen their case with a confession obtained in the absence of counsel, they would not be purposefully violating the United States Constitution, or for that matter, the New York Constitution. This Court's opinions in *Hoffa v. United States*, 385 U.S. 293, 310 (1966) and *United States v. Gouvenia*, 467 U.S. 180, 191 (1984), control the federal constitutional question. Both indicate that the authorities may legitimately delay initiating an action to avoid creating a right to counsel while they strengthen their case. To the same effect is *People v. Lane*, 64 N.Y.2d 1047, 478 N.E.2d 1305, 489 N.Y.S.2d 704 (1985), holding that the state constitutional right to counsel attaches once the criminal action commences, and that the police may take a confession from a suspect even though the felony complaint has been signed, as long as the action has not yet commenced by the filing of that felony complaint in court. Thus, on this record, the police conduct in entering respondent's apartment and arresting him after he confessed and strengthened their case cannot reasonably be viewed as flagrant or purposefully designed to violate the constitution. *See United States v. Knotts*, 460 U.S. 276, 284 (1983) ("We have never equated police efficiency with unconstitutionality, and we decline to do so now.")

The second *Brown* consideration, that of intervening circumstances, also exists here, the intervening circumstances being the *Miranda* warnings and respondent's independent desire to confess to the crime. This view of the facts was taken by two concurrers at the state Appellate Division and by the two dissenters at the New York Court of Appeals (J.A.

30-31, 52, 55). The State suggests that this interpretation is the correct view. Respondent's statements here were not the product of lengthy detention, continued questioning, or any other form of official pressure, subtle or otherwise. Rather, they were much more akin to spontaneous declarations. Respondent obviously eagerly sought to confess, and took the first possible opportunity to do so. This desire explains all of his behavior. He was glad that the police came for him; he invited them in; after he heard the *Miranda* warnings—an important consideration, *Rawlings v. Kentucky*, 448 U.S., at 107—he poured himself a glass of wine before he said that he loved Ms. Staton and killed her because she was an unfit mother. Then, at the precinct, he added much more detail to his confession, including his jealousy at Ms. Staton's seeing her former boyfriend and his rage when she lied to him; he made changes in the written statement to conform it to the truth; later, he told an assistant district attorney he had nothing more to say. Keeping in mind that respondent represented himself at hearing, trial, and appeal, the picture that emerges is one of a person who feels competent to manage his own legal affairs, and who is not cowed by the legal system or the police officers, whom he cross-examined at the hearing and trial. Obviously, for reasons of his own respondent wanted the truth about Ms. Staton's death to come out accurately. In sum, while the police provided respondent with the opportunity to confess, nothing they did induced him to confess.

Finally, the time factor here is ambiguous, *see Dunaway v. New York*, 442 U.S., at 220 (Stevens, J., concurring), but it too militates in favor of attenuation. Here, the statement at the precinct was not made immediately after arrest as happened in James Wa Toy's case, *see Wong Sun v. United States*, 371 U.S. 471, 486 (1963), and the police conduct was not calculated to cause surprise, fright, and confusion as was the case in *Brown v. Illinois*. Rather, respondent was treated courteously by the police and confessed, after renewed *Miranda* warnings, about an hour after his initial confession

and subsequent arrest. As in *Rawlings v. Kentucky*, 448 U.S., at 108, these circumstances should be held to outweigh the relatively short period of time between the initiation of the detention and the precinct confession.

D. The Police Did Not Violate The Rule of *Payton v. New York* in Entering Respondent's Home.

Finally, it should be noted that *Payton v. New York* proscribes only a warrantless, *non-consensual* entry into the home to make a routine felony arrest. *Payton v. New York*, 445 U.S. 573, 576 (1980); *Welsh v. Wisconsin*, 466 U.S. 740, 743 n.1 (1984). While the majority at the New York Court of Appeals did not address the question of consent in this case, because it believed that the trial court's finding of non-consent was binding on it, (J.A. 39), that view does not bind this Court which "... has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution." *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1967), (citing cases). This Court may independently examine the question of consent where, as here, the historical facts are not in dispute and where the correctness of the legal characterization of the facts appearing in the record may resolve the constitutional issue. *See United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (opinion of Stewart, J., citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 and *Bumper v. North Carolina*, 391 U.S. 543, 548-50). Mindful of the fact that both *Schneckloth* and *Bumper* were "consent" cases, the State suggests that the issue of whether respondent consented to the police entry into his home may be considered by this Court, especially because the two concurring justices at the Appellate Division and, apparently, the two dissenters at the Court of Appeals would have decided that respondent did consent, and because a finding that respondent did consent would resolve the Fourth Amendment issue.

Whether a suspect has consented to police entry is a question to be decided "under the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *United States v. Mendenhall*, 446 U.S., at 557. Here,

all of those circumstances indicate that respondent consented to the police entering his home so that he could talk to them. When the police went to respondent's home, they did not arrive late at night, but at the civilized hour of six p.m. While the police stationed one officer on the fire escape, obviously to prevent a quick escape by that route, there is no evidence that respondent knew the police officer was there. Likewise, though the police at the door had their guns drawn, they held them so that respondent could not see them through the peephole (J.A. 12-14). Thus, when respondent heard the police announce their presence, all that he saw was the police shield that indicated that his visitors were who they purported to be (*compare, e.g., Gouled v. United States*, 255 U.S. 298, 306 [1921]). Rather than refusing entry or even protesting it, respondent opened the door and said, "I'm glad you came for me" (J.A. 15). Then, when he heard the *Miranda* rights, respondent fixed himself a glass of wine before he began speaking.

On these facts, the trial court's conclusion that respondent submitted to the authority of the police is difficult to justify. The police made no show of force, did not demand entry, and were not overbearing in any fashion. *Compare, e.g., Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (police assert they have search warrant). Rather, the totality of all of the circumstances shows that respondent was completely in control of the situation and that his decision to allow the police to enter was a completely independent exercise of his own free will. Parenthetically, later events amply demonstrated respondent's ability in this regard; first, he poured himself a glass of wine before he talked; second, he told the assistant district attorney at the precinct that he did not wish to say any more; and third, respondent represented himself *pro se* at hearing and trial and then later during his successful direct appeal in the state courts. Respondent is college-educated and clearly knows his own mind and feels himself quite capable of standing alone against the criminal justice system of the State of New York. Thus, the State submits that the proper legal characterization of these facts is that drawn by the minority of state judges below: respondent consented to the police entry into his home because he

had independently decided to confess. Hence, there was no *Payton* violation.

In conclusion, the State urges that under the totality of all the circumstances here, resondent's precinct statement was not the product of any Fourth Amendment taint due to the policy entry into his home. Here the police had probable cause; further respondent consented to their entry, voluntarily confessed with full knowledge of his *Miranda* rights, and then left his home in lawful custody. Under these circumstances, suppression of the entirely voluntary statement at the precinct, made after respondent again heard his *Miranda* rights, will not vindicate the Fourth Amendment values which *Payton* was designed to protect, because it was not made in the home and because it was the product of constitutional police behavior in all respects. The State asks this Court to so rule and to reverse the contrary judgment of the New York Court of Appeals.

CONCLUSION

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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June 1989

REPLY

BRIEF

No. 88-1000

IN THE

Supreme Court of The United States

OCTOBER TERM 1989

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-against-

BERNARD HARRIS,
Respondent.

REPLY BRIEF FOR THE PETITIONER

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PRELIMINARY STATEMENT

In our opening brief, the State advanced four reasons why the New York Court of Appeals erroneously applied the dictates of the Fourth Amendment to suppress the precinct confession of this case: (1) that since respondent was lawfully held upon probable cause at the time he voluntarily confessed in the precinct, his confession was "seized" in complete conformity with this Court's controlling precedents; (2) that *Payton v. New York*, 445 U.S. 573 (1980) draws a bright line at the threshold of the home, and hence its exclusionary rule should properly apply only to evidence seized within the home; (3) that respondent's precinct confession was attenuated by traditional standards from any illegality associated with his arrest in his home; and (4) that, if this Court believes it can re-examine the question of respondent's consent to the police entry, it should find that respondent did consent and that, hence, there was no *Payton* violation.

The Amicus Curiae in Support of the Judgment Below (hereafter "Amicus") does not directly disagree with much of our analysis. Rather he apparently asserts that this Court should construe *Payton* in the context of one state's law, and then he draws on theories that properly belong to Fifth and Sixth Amendment jurisprudence in order to create broader

scope for the Fourth Amendment's Exclusionary Rule than has ever been suggested by this Court's opinions (Point 1). This argument rests primarily on the factually incorrect belief that the New York City police engage in what the Amicus variously describes as the custom, or policy, or systematic practice of deliberately violating *Payton*. Secondly, he argues that the precinct confession was not attenuated. This argument takes its force from respondent's account of the arrest and interrogation, which was expressly discredited by the fact finder (J.A. 29). Finally, he argues that respondent did not consent to the police entry. All of these arguments are meritless, but only his first two points require comment in this Reply Brief.

ARGUMENT

POINT

THE CIRCUMSTANCES OF RESPONDENT'S ARREST DO NOT REQUIRE THE SUPPRESSION OF THE PRECINCT CONFESSION

The briefs of the State and the Amicus contain several areas of agreement which narrow the controversy before this Court. The Amicus concedes that the police had probable cause to arrest respondent (Amicus brief, p. 4). We agree that the police could have obtained an arrest warrant but did not. We also agree that under settled New York State Law, if the police had obtained an arrest warrant they could not have interrogated respondent in the absence of an attorney. *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980). The Amicus, however, goes astray in arguing that this Court should defer to the New York Court of Appeals' reading of the Fourth Amendment because it ". . . is best able to determine the necessity of suppression as a deterrent to New York police who are motivated to violate *Payton* by restrictions on interrogation arising under New York law" (Amicus brief, p. 12).

Had the New York Court of Appeals decided this deterrence question as a matter of state law, the Amicus would be correct of course. And there is no dispute that, increasingly, the New York Court of Appeals has chosen to afford criminal defendants greater protection under state law than the United States Constitution requires. *See e.g. People v. Torres*, 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989) (refusing to follow *Michigan v. Long*, 463 U.S. 1032 [1983] as a matter of State Constitutional law and collecting cases in which the State Constitution is read more broadly than the Fourth Amendment). But the fact is that in this case, the Court of Appeals squarely addressed only the interpretation of the Fourth Amendment to the United States Constitution. *People v. Harris*, 72 N.Y.2d 614, 616, 624-25, 532 N.E.2d 1229, 1230, 1234-35, 536 N.Y.S.2d 1, 2, 7 (1989) (J.A. 40, 48-49). This decision and result conflicts with the decisions of Supreme Court of Arizona in *State v. Reffitt*, 145 Ariz. 452, 702 P.2d 681 (1985), *en banc* and the Supreme Court of Georgia in *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981). Thus, this question is ripe for this Court's consideration as a matter of Federal Constitutional law, and nothing requires this Court to defer to the New York Court of Appeals' views over those of the states of Arizona and Georgia in deciding the question. *See California v. Greenwood*, 486 U.S. , 100 L.Ed.2d 30, 39, 108 S. Ct. 1625, 1630 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs").

The Amicus also errs in his assessment of the scope of the New York City Police Department's disregard of *Payton*. To amplify upon what was stated in our opening brief at pp. 25-26, the testimony of one detective that it was "customary" "in his department" not to obtain arrest warrants (J.A.

10), simply cannot be expanded into an assertion that *Payton* violations are "the custom of the New York City Police Department" (Amicus brief, pp. 2, 5-6), are "systematic" (Amicus brief, p. 12), are "the policy of their department" (Amicus brief, p. 17), or are "routinely" carried out (Amicus brief, p. 21). In fact, the policy of the New York City Police Department is emphatically to the contrary and is officially promulgated in the June 6, 1980, Bulletin of the Office of the Deputy Commissioner—Legal Matters. After summarizing the facts and holdings of *Payton* and *Riddick*, that bulletin states:

V. WHAT DO THESE CASES REQUIRE OF POLICE OFFICERS?

The decision in these cases provides that a police officer cannot *enter* the home or residence of a suspect simply to make a routine arrest, unless one of the following three conditions is present:

1. the officer can set forth facts indicating that exigent circumstances exist; or
2. the officer has the consent of a co-occupant of the premises, or
3. the officer has an arrest warrant.

Unless one of the above conditions is present, any evidence obtained or confession secured as a result of the arrest may be suppressed. Although both *Payton* and *Riddick* involved felony offenses, in the opinion of the Legal Bureau the new rule announced in *Payton* is also applicable in non-felony cases. The Supreme Court, in reaching its decision, left certain issues open, such as the authority of the police to "enter a third party's home to arrest a suspect" without having consent or a search or arrest warrant. Terms such as "routine felony arrest" and "exigent circumstances" were used by the Court without being defined or

explained. Accordingly, the following guidelines should be utilized by member of the service:

After summarizing its guidelines, the bulletin concludes:

VI. CONCLUSION:

The warrant requirement mandated by *Payton* is particularly applicable to detective investigators who, while conducting their investigations, may have sufficient time to obtain an arrest warrant. However, uniformed officers on patrol will also be confronted with situations where a routine arrest in a suspect's home will require an arrest warrant.

Police officers should document the facts, in addition to probable cause, that justified an emergency or exigent warrantless entry for arrest purposes. The burden of establishing a lawful basis for a warrantless entry into a suspect's home, i.e., consent, emergency, exigent reasons, etc., will be upon the arresting officer in court where seized evidence is the subject of a suppression hearing.

NOTE: An arrest warrant may only be obtained by filing an accusatory instrument in court. In *People v. Samuels*, 49 N.Y.2d 218, the New York State Court of Appeals held that upon the filing of an accusatory instrument, the right to counsel attaches and a suspect *cannot* waive his *Miranda* rights unless an attorney is present (*See* Legal Bulletin Vol. 10, No. 3).

Any inquiries with respect to the matters covered in this Bulletin should be directed to the Legal bureau (374-5400).

Moreover, to the limited extent that the detective's testimony may be read to describe a custom of violating *Payton*, it is contradicted by that of his partner, who testified that he would have left if respondent had not invited them in (J.A. 8). Thus, on this record, the fact that a reviewing court

later determined that in this single case the police misjudged respondent's apparent consent to their entry, found that he had submitted to their authority,[1] and concluded that the police had violated *Payton* simply cannot be expanded into the city-wide, departmental disregard of *Payton* that the Amicus portrays.

Finally on this point, the Amicus ignores the fact that the custom of this particular detective to avoid seeking a warrant in the hope of obtaining an admissible confession from a willing suspect comports with *Payton's* requirements. Nothing in *Payton* precludes the police officer who has probable cause to arrest from going to the suspect's home and attempting to gain a consensual entry for the purpose of interrogation before he obtains an arrest warrant. This Court recognized the reasonableness of such behavior in *Schneckloth v. Bustamonte*, 412 U.S. 218, 230 (1973). This detective certainly was not intending to violate respondent's rights or coerce a confession. Had this been the case, he would not have read him the *Miranda* rights. Nor did he have any obligation to obtain an arrest warrant and preclude all reasonable likelihood of securing a voluntary, uncounseled confession before he went to respondent's home. The Sixth Amendment imposes no such restriction. *Hoffa v. United States*, 385 U.S. 293, 310 (1966); *United States v. Gouvenia*, 467 U.S. 180, 191 (1984). The rule is the same under New York law. *People v. Lane*, 64 N.Y.2d 1047, 478 N.E.2d 1305, 489 N.Y.S.2d 704 (1985). Thus, in all respects the Amicus makes too much of an isolated portion of the

[1] The evidence on which this conclusion rests is far from overwhelming. The police at the door merely announced their presence and displayed a shield. Their guns were not visible to respondent (J.S. 11-14). The police officer on the fire escape did not have his gun drawn and merely tapped on the window (J.S. 14). Moreover, the window had drapes on it, and Police Officer Egan did not see anyone look out (R. 182). Thus, it is extremely doubtful that respondent saw him. Hence, the circumstances in this case in no way resemble those in *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989), and *United States v. Morgan*, 743 F.2d. 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985), on which the Amicus relies. Additionally the only evidence in the record which depicts the set of facts on which the Amicus relies is the testimony of respondent (J.A. 26-27), which was expressly discredited by the fact finder (J.A. 29).

testimony of a single detective when he argues that the New York Court of Appeals was in the best position to judge the deterrence necessary to stop city-wide, systemetized, routine violations of the requirements of *Payton* in New York. In fact, if the admittedly close question of consent been resolved differently by the fact finder, this detective's conduct would have comported with the Constitution in all respects.

Nor can the State accept the Amicus's argument that the Court of Appeals' decision promotes the principles and policies on which *Payton* and *Brown v. Illinois*, 422 U.S. 590 (1975) are based (Amicus brief, pp. 13-14). While the State agrees that the Fourth Amendment "protects people, not places," *United States v. Chadwick*, 433 U.S. 1, 7 (1977) (Amicus brief, p. 15), we believe it is not arcane for this Court to keep the line of *Payton's* protection just where it drew it initially, at ". . . the unambiguous physical dimensions of an individual's home . . ." *Payton v. New York*, 445 U.S. 573, 589 (1980). Under this analysis, the courts below properly suppressed respondent's confession made in his home, and if any physical evidence had been seized in respondent's home, suppression of that evidence would have been proper as well. But to argue as the Amicus does that such suppression is insufficient to vindicate Fourth Amendment values, and that "the police will never be deterred from arresting an individual at home in hopes of obtaining an incriminating statement if they only have to walk outside before they begin their questioning" (Amicus brief p. 18), is to graft Fifth Amendment principles on to the Fourth Amendment to the disservice of both Amendments.

The point that the Amicus misses is that respondent's continued detention outside of his home was in all respects lawful and his confession was completely voluntary. *See e.g. United States v. Robinson*, 414 U.S. 218, 235 (1973). That is what distinguishes this case from *Brown*. The Amicus misreads *Brown* when he argues that "given that the body of a defendant cannot be suppressed as the fruit of an illegal

arrest, the admissibility of the statement in *Brown v. Illinois* could not have turned on the notion that the police, lacking probable cause, had custody of Brown's body illegally" (Amicus brief, p. 19-20). *Brown* stands for the proposition that the *Miranda* warnings by themselves cannot *always* purge the Fourth Amendment taint of prolonged interference with a suspect's right to be free from seizure of his person on less than probable cause. Where the police have probable cause, however, the vice that led to *Brown's* holding is absent. Therefore, the *Miranda* warnings which ensure that a suspect's confession is voluntary for Fifth Amendment purposes should be sufficient to purge the taint of Fourth Amendment violations which are less extreme than prolonged custodial interrogation on less than probable cause.

If the Amicus's argument were to become law, it would lead to some very bizarre results. Under the Amicus's rule, a voluntary confession given outside the home should be suppressed if given during continued police custody of the suspect after a *Payton* violation. But if after violating *Payton*, the police take the suspect out of his home, release him, follow him, and then rearrest him outside his home, under the Amicus's rule the arrest would be legal and the confession admissible (Amicus brief, p. 23). Given that many defendants are violent and dangerous individuals, it would be poor police practice and even poorer policy to require officials to release a probable murderer into the community in order to obtain the right to question him. Rather the correct, workable, and sound rule is the one proposed by the State. *Payton's* protection should end at the threshold of the home as that boundary is defined by this Court. *E.g. United States v. Dunn*, 480 U.S. 294 (1987).

If after a *Payton* violation, a suspect should leave his home and then voluntarily agree to waive his Fifth Amendment Rights, that independent act of free will should be sufficient to attenuate the *Payton* taint and should render his confession admissible.

CONCLUSION

THE JUDGEMENT OF THE NEW YORK COURT OF APPEALS SHOULD BE REVERSED

Respectfully submitted,

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December 1989

AMICUS CURIAE

BRIEF

No. 88-1000

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NEW YORK, PETITIONER

v.

BERNARD HARRIS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a statement given by respondent while he was in police custody following the warrantless entry of his home to make his arrest should be suppressed as the fruit of a violation of *Payton* v. *New York*, 445 U.S. 573 (1980).

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INTEREST OF THE UNITED STATES

This case presents the question whether a defendant's statement, made while he was in custody following a warrantless entry of his home to arrest him, should be excluded from evidence as the fruit of a violation of *Payton* v. *New York*, 445 U.S. 573 (1980). Federal law enforcement officers generally refrain from making warrantless entries to arrest suspects in their homes absent exigent circumstances or consent. Nonetheless, such arrests occasionally occur, particularly where courts conclude that the facts did not constitute "exigent circumstances," even though the agents may have believed at the time that a warrantless "exigent circumstances" entry was justified. Additionally, federal authorities prosecute cases upon referral from state and local jurisdictions, after violations of *Payton* have occurred and statements have been given. Accordingly, the United States has a law enforcement interest in the outcome of this case.

STATEMENT

1. On January 11, 1984, the police found the dead body of Thelma Staton in her apartment. The police investigation soon developed probable cause to believe that respondent had committed the murder. On January 16, 1984, at about 6:30 p.m., three police officers went to respondent's apartment, without a warrant, to take him into custody. After knocking on respondent's door and obtaining no response, one officer used a fire escape to reach a window of the apartment. The officer knocked on the window and said "Police." At the same time, the other two officers again knocked on the front door, with badges displayed and guns drawn. Pet. App. 2a; R. 41.

Respondent then came to the door and asked, "Who is it?" After one officer held his badge up to the peephole, respondent allowed the officers to enter, stating that he was glad that the police had come for him. After respondent was read his *Miranda* rights, he acknowledged that he understood them and said that he was willing to answer questions. The police told respondent that they suspected him of murdering Thelma Staton. Respondent then poured himself a glass of wine and told them that he had committed the murder. Pet. App. 2a, 14a.

Respondent was placed under formal arrest and taken to the police station. At the station, respondent was again given *Miranda* warnings and indicated he understood them. About one hour after his arrest, respondent dictated a written statement confessing to the murder and describing it in detail. Respondent read the statement, made one change in the written version, and signed it. Pet. App. 1a-2a, 14a-15a, 21a-22a.

An assistant district attorney subsequently arrived to conduct a videotaped interview of respondent. Before the interview, respondent was advised of his *Miranda* rights

for a third time. In response to a question whether he wanted to speak about the victim's death, respondent answered that he was tired and had said all he could say. A full statement was nonetheless videotaped in which respondent again confessed to Staton's murder. Pet. App. 2a-3a.

2. The trial court suppressed the oral statement respondent made upon his arrest in his apartment as "the product of an illegal arrest." Pet. App. 3a. The court reasoned that although the officers had probable cause to arrest respondent when they entered his apartment, the entry was accomplished by their show of authority and without a warrant. Accordingly, the court found, there could be "no clearer violation" of the rule of *Payton* v. *New York*, 455 U.S. 573 (1980). Pet. App. 3a. The court also suppressed the videotaped confession because respondent had indicated that he did not wish to be questioned prior to the making of the videotape. As to the written statement given in the station house, however, the trial court denied the motion to suppress, because it found that the taint of the illegal entry was sufficiently attenuated to justify the admission of the statement. *Id.* at 3a, 22a. After a bench trial in which respondent's station house statement was admitted into evidence, respondent was convicted of second degree murder.

3. The Appellate Division affirmed, Pet. App. 19a-26a, but the New York Court of Appeals reversed, *id.* at 1a-18a. The Court of Appeals held that respondent's written statement given in the station house should have been suppressed as the fruit of the warrantless entry of his apartment.

The Court of Appeals accepted the trial court's conclusion that the entry of respondent's apartment and his arrest were not consensual and therefore violated the rule in *Payton* v. *New York*, *supra*. Accordingly, the court

limited its review to the question "whether the causal connection between the illegality and the [station house] confession was attenuated." Pet. App. 2a. To answer that question, the court turned to this Court's decisions in *Wong Sun* v. *United States,* 371 U.S. 471 (1963), and *Brown* v. *Illinois,* 422 U.S. 590 (1975), which require the suppression of any statement obtained as the fruit of an arrest made without probable cause unless the causal connection between the arrest and the statements is broken. Pet. App. 5a-6a.

Under *Brown,* the court noted, the factors bearing on this determination are the temporal proximity between the arrest and the statement, the existence of intervening events, and the purpose and flagrancy of the police conduct. Pet. App. 6a. The court concluded that none of those factors supported a finding of attenuation here. The repetition in the station house of the *Miranda* warnings, the court observed, was insufficient standing alone to purge any prior taint. *Ibid.* The court also found that the police misconduct was "knowing and intentional" because the officers had failed to obtain an arrest warrant despite the opportunity to do so. The court added that one officer had testified that departmental policy was not to obtain warrants before home arrests. From this, the court stated, "a reasonable inference can be drawn • • • that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession." *Id.* at 8a.

The court rejected the view that the officers' probable cause to arrest respondent distinguishes this case from other types of illegal arrests. Pet. App. 9a. The court noted that some courts had reasoned that the "wrong in *Payton* cases • • • lies not in the arrest, 'but in the unlawful entry into a dwelling without proper judicial authorization' " and had therefore declined to suppress con-

fessions that were made following *Payton* violations. *Id.* at 10a. The court disagreed with that analysis, however, believing it to be contrary both to *Payton* itself and to its own decisions, in which it had construed *Payton* to require the suppression of tangible evidence seized during a warrantless entry of a home to make an arrest. *Ibid.* The court also stated that this Court's decision in *United States* v. *Johnson,* 457 U.S. 537 (1982), foreclosed the argument that statements given after *Payton* violations should be governed by a different analysis than statements given after an arrest made without probable cause. Pet. App. 10a-11a.

Justice Titone concurred on the basis of precedent, but expressed "serious misgivings about the unquestioning use of the *Brown* analysis in cases involving *Payton* violations." Pet. App. 11a-12a. He argued that the predicate for applying the attenuation analysis of *Brown* is that " 'the challenged evidence is in some sense the product of illegal governmental activity.' " *Id.* at 12a, quoting *United States* v. *Crews,* 445 U.S. 463, 471 (1980). In cases like *Brown,* "the 'illegality' is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement." Pet. App. 12a. Thus, the " 'challenged evidence'—i.e., the post-arrest confession—is unquestionably 'the product of [the] illegal government activity'—i.e., the wrongful detention." *Ibid.* That is not the case, however, when a suspect gives a post-arrest confession following a *Payton* violation. In such a case, Justice Titone explained, the police have probable cause to arrest and detain a suspect; the only respect in which such an arrest is unlawful is that it was effected improperly by entering the suspect's home without a warrant. Accordingly, "the initial causal relationship between the illegality and the subsequently obtained statement is more dubious," because

"it is not the detention itself that is wrongful, but rather the manner in which the arrest was carried out." *Ibid.* "Although we sometimes use legal shorthand and refer to the police action as an 'illegal arrest,' " he concluded, "the true wrong in *Payton* cases lies not in the arrest but in the unlawful *entry* into a dwelling without proper judicial authorization." *Ibid.*

Two justices dissented. Applying the principles of *Wong Sun* and *Brown*, they expressed the belief that respondent's statements were the result not of his detention following a *Payton* violation, but of his own free will untainted by the circumstances of his arrest. Pet. App. 13a-18a.

SUMMARY OF ARGUMENT

The statement given by respondent at the station house should not have been suppressed as a fruit of the warrantless entry of respondent's apartment. Under *Payton* v. *New York*, 445 U.S. 573, 576 (1980), the warrantless entry of a home to effect a routine felony arrest violates the Fourth Amendment. The essence of such a violation, however, lies not in the arrest itself, but in the warrantless invasion of the privacy of the home to effect it. When arresting officers have probable cause, the general Fourth Amendment rule is that no warrant is required to effect a felony arrest. By creating an exception to that general rule, *Payton* does not purport to protect against the warrantless seizure of the person of the arrestee. Rather, the focus of *Payton* is on an analytically distinct interest: the protection of the home against warrantless entries.

Under this Court's precedents, the appropriate remedy for a *Payton* violation is therefore to suppress evidence that the officers observe by virtue of their presence in the arrestee's home. It is not appropriate to suppress post-

arrest statements that are made by a person who is in lawful custody based on probable cause to believe he has committed a crime.

The analysis in this Court's "fruit of the poisonous tree" cases dealing with illegal arrests should not govern here. What is missing is the premise for making a "fruits" inquiry—that "the challenged evidence is in some sense the product of illegal government activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). This Court's decisions that inquire whether the taint from an improper arrest has been attenuated all involve arrests that were illegal because the police lacked probable cause. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Taylor* v. *Alabama*, 457 U.S. 687 (1982). When the police take a person into custody without probable cause based solely on "the hope that something would turn up" during interrogation, *Taylor*, 457 U.S. at 691, it is proper to consider whether statements given during custody are an "exploitation of the illegality of [the] arrest." *Brown*, 422 U.S. at 600. By contrast, when there is probable cause for an arrest, and the unlawful act consists only in the entry into the home to effect it, the subsequent detention does not "exploit" the original unlawful entry in any meaningful sense.

Admitting post-arrest statements following *Payton* violations will not undermine the exclusionary rule's goal in deterring warrantless home arrests. Violations of *Payton* will be adequately deterred by excluding from evidence items that the officers see or seize while they are improperly within the house. Nor must courts engage in an attenuation inquiry in every case involving post-arrest statements following a *Payton* violation in order to protect against the admission of unreliable evidence. If police officers effect the arrest in an unreasonable manner so as to taint the voluntariness or reliability of the statement, that issue can

be addressed under the Fifth Amendment, or as an independent issue under the Fourth Amendment.

ARGUMENT

STATEMENTS MADE BY A SUSPECT HELD IN CUSTODY BASED ON PROBABLE CAUSE, FOLLOWING THE WARRANTLESS ENTRY OF HIS HOME TO MAKE AN ARREST, SHOULD NOT BE SUPPRESSED

A. *Payton* v. *New York*, 445 U.S. 573 (1980), Protects Against Warrantless Entries Of A Dwelling, Not Against Warrantless Arrests

In *Payton* v. *New York*, 445 U.S. 573, 576 (1980), this Court announced the rule that the Fourth Amendment prohibits "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." The Court began with the premise that "[t]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " 445 U.S. at 573, quoting *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). As applied to a search for tangible items, the Court reasoned, this principle makes a warrantless entry of the home presumptively unreasonable. *Id.* at 586. The Court found that the same rule applies to a warrantless entry for the purpose of making an arrest. *Id.* at 588-599.[1]

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[1] *Payton* involved two consolidated cases in which police officers made warrantless entries into dwellings to make arrests, in reliance on a New York statute authorizing such conduct. In the course of each entry, the police acquired tangible evidence that was later used against the defendants. 445 U.S. at 576-577 (.30-caliber shell casing found in Payton's house); *id.* at 478 (narcotics and narcotics paraphernalia found in Riddick's house). Neither case involved statements given by an arrestee held in custody following the warrantless entry. Nor did the Court reach the issue of the admissibility of such statements in *United States* v. *Johnson*, 457 U.S. 537 (1982), which applied the rule in *Payton* retroactively. The court of appeals in *Johnson* had treated

By requiring a warrant to enter a dwelling for the purpose of making an arrest, the Court in *Payton* recognized a narrow exception to the general rule that, consistently with the Fourth Amendment, a person may be arrested on probable cause without a warrant. See *United States* v. *Watson*, 423 U.S. 411 (1976) (upholding a warrantless arrest in a public place); *United States* v. *Santana*, 427 U.S. 38, 42 (1976) (upholding a warrantless arrest on the threshold of a house). "The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Carroll* v. *United States*, 267 U.S. 132, 156 (1925); see also *Ker* v. *California*, 374 U.S. 23 (1963); *Draper* v. *United States*, 358 U.S. 307, 310 (1959). "[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975).

Because there is no need for a warrant to make an arrest in any place other than the home, *Payton* is properly understood as safeguarding the privacy of a dwelling against a warrantless entry, rather than protecting the person of the arrestee against a warrantless arrest.[2] This

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statements following an arrest in violation of *Payton* as the fruit of the entry of the home. 626 F.2d 753, 757-759 (9th Cir. 1980). The government did not challenge that holding in its certiorari petition, and the Court did not discuss the question. 457 U.S. at 541 n.6.

[2] Although the interest in the privacy of the home identified by *Payton* might logically suggest that a search warrant, rather than an arrest warrant, should be required, the Court stated that an arrest warrant would suffice to authorize entry into the home, because "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitu-

understanding of *Payton* is reinforced by the Court's repeated emphasis on the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." 445 U.S. at 601. The Court explained that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. Nothing in the Court's reasoning, however, suggests that a warrantless arrest within the home somehow invalidates the police custody over the individual when there is probable cause for the arrest.

In light of *Payton*'s rationale of protecting the distinct constitutional interest in freedom from warrantless entries into the home, the remedy for a *Payton* violation is to suppress what the officers see or seize by virtue of their presence in the interior of the home. That rationale of *Payton*, however, does not require suppression of evidence acquired from a suspect who is properly in custody based on probable cause that he has committed a crime. Such evidence should be viewed not as the consequence of the improper entry that resulted in the arrest, but as a "fruit" of the proper custody in which the arrestee is held as a result of the existence of probable cause.[3]

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tionally reasonable to require him to open his doors to the officers of the law." 445 U.S. at 602-603. *Cf. Steagald* v. *United States*, 451 U.S. 204 (1981) (police possessing an arrest warrant for an individual may not, without a search warrant, enter the home of a third party to make a routine arrest).

[3] In suppressing respondent's statements, the Court of Appeals failed to recognize that distinction. Similar confusion is manifested by courts that have found a *Payton* violation when an individual is summoned from his home and then arrested by officers who remain outside the dwelling. See *United States* v. *Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984) (finding *Payton* violation when police "flooded the house with spotlights and summoned Morgan from his mother's home with the blaring call of a bullhorn"), cert. denied, 471 U.S. 1061 (1985); *United States* v. *Al-Azzawy*, 784 F.2d 890, 893 & n.1 (9th Cir. 1986) (finding *Payton* violation when "the police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees. • • • [S]ince appellee was in his trailer at the time he was surrounded by armed officers, • • • the arrest occurred while he was still inside his trailer."); *United States* v. *Maez*, 872 F.2d 1444 (10th Cir. 1989) (finding *Payton* violation when several armed officers surrounded a mobile home and over loudspeakers asked the occupants to come out). See also *United States* v. *Davis*, 785 F.2d 610, 615 (8th Cir. 1986) (discussing conflicting decisions regarding whether an arrest at the doorway constitutes a "house arrest and is improper"). We believe that these holdings are incorrect. When there is no actual crossing of the threshold of the home, the interests protected by *Payton* are not implicated and the arrest should be found to be valid under *Watson* and *Santana*.

B. A Confession Following A *Payton* Violation Is Not The "Fruit" Of An Illegal Arrest

This Court has recognized that evidence may not be suppressed unless a court is satisfied that "the challenged evidence is in some sense the product of illegal goverment activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). In *Crews*, the Court refused to suppress a victim's in-court identification despite the defendant's illegal arrest. The Court found, as a threshold matter, that the evidence was not " 'come at by exploitation' of • • • the defendant's Fourth Amendment rights," and that it was not necessary to inquire whether the "taint" of the Fourth Amendment violation was sufficiently attenuated to permit the evidence to come in. *Ibid.* The same conclusion applies to the relationship between an entry of the home to arrest a suspect and his subsequent detention based on probable cause.

When a suspect is arrested in his home in violation of *Payton*, but later gives a statement while in police custody, that statement is not the "product," in the sense meant by

Crews, of the prior Fourth Amendment violation. As long as the police have probable cause to make the arrest, the initial entry of the home cannot be characterized as the cause of the arrestee's subsequent custody and his statement made during that custody. Cf. *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972) (where a magistrate authorizes a suspect's continued detention after his arrest, "the detention • • • [is] under the authority of this commitment," making it irrelevant for purposes of the admissibility of a subsequent lineup whether the initial arrest was unlawful).

If the police officers had made a warrantless entry into respondent's home while he was not there, only to arrest him later on the street when he returned, he would have been in precisely the same position as he was in this case. It would make little sense to suppress respondent's station house statement because he was in his apartment when the police arrived, but to have admitted it if he had happened to be absent. In either situation, the same invasion of the home has occurred, and the same result should follow: items seized from the home should be treated as fruits of the entry, but the statements given by respondent at the police station should not.[4]

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[4] Although respondent gave three statements, the only one before this Court is his written statement dictated at the station house, which the New York Court of Appeals suppressed as a fruit of the *Payton* violation. The trial court had suppressed the statement respondent made in his apartment when he was arrested. Pet. App. 3a. That statement, however, played no role in the Court of Appeals' holding that all statements following *Payton* violations must be analyzed for attenuation of taint from the arrest. See Pet. App. 7a (noting, in passing, that respondent's earlier statement was one factor that pointed toward the absence of attenuation from the "illegal" arrest). Accordingly, this case does not present the question whether the first statement was admissible, or the question whether, if the first statement was inadmissible, the second statement should be suppressed as its fruit. Cf. *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985) (a statement given after a suspect's waiver of his *Miranda* rights is not tainted by an earlier statement given in response to noncoercive, but unwarned, questioning). Compare *United States* v. *Patino*, 830 F.2d 1413, 1419-1420 (7th Cir. 1987) (excluding confession found to be the product of an unconstitutional search, and remanding for determination whether second confession was the fruit of that search).

If, contrary to the analysis suggested here, the Court should reach the question whether the "taint" of respondent's arrest was attenuated by the time he made the station house statement, we submit that it was. A significant factor in favor of admitting the statement is that the police had probable cause for respondent's arrest and detention. Cf. *United States* v. *Maier*, 720 F.2d 978, 980 (8th Cir. 1983) (declining to decide whether there was probable cause for the arrest, because the statements in question were not the fruit of any illegality since they were made "only after intervening events had given police probable cause to arrest Maier"); *United States* v. *Manuel*, 706 F.2d 908, 911-912 (9th Cir. 1983) (weighing the formation of probable cause after the arrest but before the interrogation as a factor in finding attenuation).

In excluding respondent's statement at the station house, the Court of Appeals relied on this Court's decisions in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), *Brown* v. *Illinois*, 422 U.S. 590 (1975), and *Taylor* v. *Alabama*, 457 U.S. 687 (1982). These decisions, however, are entirely consistent with the analysis we have suggested; they do not support exclusion of respondent's confession. *Wong Sun*, *Brown*, and *Taylor* stand for the familiar principle that the indirect fruits of an illegal arrest or search should be suppressed when they bear a sufficiently close causal connection to the underlying illegality. See also *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Rawlings* v. *Kentucky*, 448 U.S. 98, 106-110 (1980); *Lanier* v. *South Carolina*, 474 U.S. 25 (1985) (per curiam). These cases,

however, consistently treat as an "illegal arrest" one in which the police lack probable cause to detain a suspect. Thus, the police conduct condemned in *Brown, Dunaway,* and *Taylor* involved a common pattern that differs in an important respect from the conduct in respondent's case. In each of those cases, "the police arrested suspects without probable cause, * * * transported [them] to police headquarters, * * * and interrogated [them]. They confessed within * * * hours of their arrest." *Taylor,* 457 U.S. at 689-690. The vice of such conduct is the arrest of a suspect on mere suspicion, "in the hope that something would turn up" while the individual is in custody. *Id.* at 691.

Neither respondent's arrest nor any other arrest in violation of *Payton* is "illegal" in the sense used by those cases. There is no dispute that the police had probable cause to arrest respondent and could lawfully have arrested him without a warrant anywhere but inside his dwelling. Cf. *Santana,* 427 U.S. at 42 (upholding warrantless arrest of person standing in the doorway of her house). The dangers of the custodial interrogation of a mere suspect, which provoked the Court's concern in *Brown, Dunaway,* and *Taylor,* are not present in that setting.

C. The Admission Of Statements Given After Warrantless Home Arrests Will Neither Encourage *Payton* Violations, Nor Permit The Use Of Improperly Obtained Confessions

The admission of voluntary confessions in cases involving warrantless home arrests will not undermine the goal of deterring police conduct forbidden by *Payton.* In any case involving a warrantless entry of a home to effect an

arrest, the evidence derived from the officer's unlawful presence in the home can be suppressed as the direct fruit of the unlawful entry.[5] Thus, what the officers find in the house, in plain view or otherwise, cannot be used in evidence against the arrestee. The exclusion of a confession made by a suspect properly in custody after a probable-cause arrest is unnecessary to promote the policies informing *Payton.*

Nor will the admission of such station house statements result in the use of evidence that lacks reliability or is otherwise the product of unconstitutional behavior. In general, there is no reason to believe that the location of a probable-cause arrest bears any causal relation to the willingness of an arrestee to give a statement during a subsequent detention, or to the trustworthiness of such a statement when it is given. In some cases it may be that the specific manner of effecting the arrest threatens to produce an unreliable statement, because the officers' conduct has an unreasonable propensity to shock or frighten a suspect. Cf. *Wong Sun,* 371 U.S. at 486. But the Fifth Amendment's requirement of voluntariness protects against the use of such statements. See *Oregon* v. *Elstad,* 470 U.S. 298, 308-309 (1985); *Orozco* v. *Texas,* 394 U.S. 324 (1969). Moreover, even in Fourth Amendment terms, the issue is properly analyzed by considering the use of excessive force or other particularly unreasonable conduct in making the arrest to constitute an independent Fourth Amendment violation, just as it would if such conduct oc-

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[5] Of course, there may be some other ground for admitting the evidence under the exclusionary rule. See, *e.g., Murray* v. *United States,* 108 S. Ct. 2529, 2533 (1988) (independent source).

curred in an arrest outside the home. See *Graham* v. *Conner*, 109 S. Ct. 1865, 1871 (1989); *Tennessee* v. *Garner*, 471 U.S. 1 (1985).

In respondent's case, there is no basis for concluding that the arrest in his home had any effect on his decision to confess. Respondent admitted the police to his home at 6:30 p.m. after one officer held up his badge to the peephole. He stated that he was glad that the police had come for him. After being read his *Miranda* rights, respondent acknowledged that he understood them and said he was willing to answer questions. The police then told respondent that they suspected him of murdering Thelma Staton. Respondent poured himself a glass of wine and stated that he had committed the murder. Pet. App. 2a. There is no plausible basis for contending that, apart from the *Payton* violation, the circumstances of respondent's arrest violated the Fourth or Fifth Amendments and unconstitutionally tainted respondent's subsequent statement at the police station. Accordingly, respondent's statement should not have been suppressed.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

(3)

No. 88-1000

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE STATE OF NEW YORK
Petitioner,

v

BERNARD HARRIS
Respondent

BRIEF AMICUS CURIAE BY THE OFFICE OF THE PROSECUTING ATTORNEY, WAYNE COUNTY, MICHIGAN, IN SUPPORT OF THE PETITIONER

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DID THE COURT BELOW ERRONEOUSLY CONSTRUE THE FOURTH AMENDMENT BY HOLDING THAT THE WARRANTLESS ARREST OF A MURDER SUSPECT IN HIS HOME, ALTHOUGH BASED ON PROBABLE CAUSE, REQUIRES, BY ITSELF, EXCLUSION OF EVIDENCE OF HIS VOLUNTARY CONFESSION GIVEN WITH FULL COMPREHENSION OF THE WARNINGS REQUIRED BY MIRANDA V ARIZONA?

STATEMENT OF THE CASE/INTEREST OF AMICUS CURIAE

Amicus would adopt the statement of the case of the Petitioner, but would emphasize several points detailed in the opinion of the court below. Amicus is the Office of the Prosecuting Attorney for the County of Wayne, which includes the Detroit Metropolitan area, and is the fourth largest county in the nation. The issue before the Court has arisen and is pending in cases in Wayne County.

1. Probable cause to arrest respondent for the murder of one Thelma Staton existed at the time of respondent's arrest.

2. The entry into the respondent's dwelling was without an arrest warrant.

3. The statement taken from respondent in his apartment followed Miranda warnings, and was clearly voluntary.

4. The majority below found that the entry violated Payton v New York because achieved without an arrest warrant, and, applying the four factor test of Brown v Illinois, found that the "taint" of the illegal arrest had not been dissipated.

SUMMARY OF ARGUMENT

The person of the respondent in this case was seized upon probable cause, and a confession subsequently taken from respondent which comported both with the Fifth Amendment (i.e. was voluntary) and Miranda v Arizona (the requisite warnings were given and waived). However, the seizure of the respondent's person was achieved after a warrantless entry into his dwelling which the lower court found improper under Payton v New York. Applying an "attenuation" analysis, the court below held that the confession was the "poison fruit" of the "illegal arrest" of the respondent, and suppression was thus required.

Amicus submits that the lower court failed to distinguish between the fruit of

an unlawful entry and the fruit of an unlawful arrest. Respondent was lawfully arrested, but the entry into his dwelling was unlawful. This Court's cases make clear that the requirement of a warrant to arrest an individual in the dwelling is not to protect the privacy of the person against a warrantless arrest, but to protect the privacy of the dwelling against warrantless entry. That being so, the fruit of an unlawful entry must be viewed as physical evidence found on the premises. However, that connected to the person of the individual arrested upon probable cause--confessions, identifications, and physical evidence found on the person--should not be viewed as fruit of the entry, but fruit of the probable cause based arrest. No attenuation analysis is thus required, other than a recognition that the fruit involved here does not come from the poisoned tree at all.

Argument

THE FRUITS OF A PROBABLE CAUSE BASED SEIZURE OF THE PERSON, SUCH AS CONFESSIONS, IDENTIFICATIONS, AND PHYSICAL EVIDENCE ON THE PERSON, OBTAINED AFTER AN ENTRY INTO THE DWELLING TO ACHIEVE THE ARREST WHICH, BECAUSE WARRANTLESS, VIOLATED PAYTON V NEW YORK, ARE NOT PROPERLY CONSIDERED FRUITS OF THE ILLEGAL ENTRY, SO AS TO REQUIRE AN ATTENUATION ANALYSIS UNDER BROWN V ILLINOIS; RATHER, THE ONLY FRUIT OF THE ILLEGAL ENTRY, AS DISTINGUISHED FROM THE ARREST ITSELF, IS PHYSICAL EVIDENCE FOUND ON THE PREMISES, NOT CONNECTED TO THE PERSON OF THE INDIVIDUAL ARRESTED.

The concurring Judge in the court below stated that he continued

> to have misgivings about the unquestioning use of the Brown (Brown v Illinois) analysis in cases involving Payton violations. Unlike in Brown, where the 'illegality' was the absence of probable cause, in cases involving Payton violations it is not the detention itself that is wrongful, but rather the manner in which the arrest was carried out. Whether there is a sufficient causal relationship between the unlawful entry and the police's subsequent obtaining of a statement is a

> matter that should be explored before the court embarks on the more traditional attenuation inquiry.

Amicus submits that the concurring opinion reveals the proper question in this case with precision--not whether Brown v Illinois was properly applied in this case, but whether, indeed, the fruits of the probable cause based seizure of the person, such as confessions, identifications, and physical evidence on the person, obtained after an entry into the dwelling to achieve the arrest which, because warrantless, violated Payton v New York, are properly considered fruits of the illegal entry, so as to require an attenuation analysis under Brown v Illinois, or whether the only fruit of the illegal entry, as distinguished from the arrest itself, is physical evidence found on the premises, not connected to the person of the individual arrested? Amicus submits

that the correct answer is that the fruit of an illegal entry to achieve a probable cause based arrest is physical evidence found in the dwelling, because of the violation of the privacy interest in the dwelling, and not any evidence connected with the person of the individual arrested, as the detention itself is not unlawful.

The starting point in the analysis, in order to ascertain the interest protected by the requirement of an arrest warrant before entry into the suspect's dwelling to accomplish his arrest can be made, must be Payton v New York, 445 US 544; 63 L Ed 2d 639; 100 S Ct 1371 (1980). This Court in considering whether judicial process should be required before the police may make a non-consensual entry into an individual's dwelling to achieve his arrest observed that the "physical entry of the home is the chief

evil against which the Fourth Amendment is directed" (emphasis added), 445 US at 585, and stated that the Court had "long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort." 445 US at 586. Citing the case of Dorman v United States, 435 F 2d 385 (1970) with approval, the Court agreed with Judge Levanthal that "the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended" (emphasis added). 445 US at 588. The Court concluded that "neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our

traditions since the origins of the Republic" (emphasis added), 445 US at 601, and held that an arrest warrant, and reason to believe the suspect is inside, is required to justify the non-consensual entry of the dwelling of a suspect to make an arrest.

It is clear, then, that the concern of the Court in Payton was not the probable cause based seizure of the person without an arrest warrant--cf. United States v Watson, 423 US 411; 46 L Ed 2d 598; 96 S Ct 820 (1976); United States v Santana, 427 US 38; 49 L Ed 2d 300; 96 S Ct 2406 (1976)--but the warrantless invasion of the privacy of the dwelling to achieve the seizure of the person, for "it is inherent in such an entry that a search for the suspect may be required before he can be apprehended."

Assuming then, that a violation of Payton (where probable cause for arrest exists, as it did in the instant case) may properly be considered an improper manner of achieving an arrest, the detention of the individual itself being proper, as recognized by the concurring judge below, is the same approach to the "poison fruit" question justifiable when it is the manner of arrest which was inappropriate as when it is the detention itself which was unlawful (that is, without probable cause)? Amicus submits that treating these very different situations identically, as did the court below, is mistaken.

The four factor approach to attenuation, or "purging the taint," developed in Brown v Illinois, 422 US 590; 45 L Ed 2d 416; 95 S Ct 2253 (1975) with

regard to confessions following an illegal arrest was developed in the context of a seizure of an individual, and his further detention, absent probable cause. In that case there was no constitutional basis for the defendant to be in the custody of the police. Thus, in order to purge the taint of the Fourth Amendment violation, or to consider it dissipated, the Court held that more was required than that the confession given be found voluntary. But this was because the interest involved was that of <u>freedom of the individual from the unlawful seizure of his person</u> (a seizure of his person absent probable cause). The privacy interest was in the person itself, and thus in this circumstance evidence pertaining to the individual, such as confessions, identifications, and physical evidence found on his person, is the possible object of suppression as the fruit of the violation of the privacy interest involved. But not so

where the violation is not one of a lack of probable cause, but rather of the manner of achieving the detention, for the privacy interest which has been violated is simply a different one, and must be viewed as having different "fruit." Where the dwelling is improperly invaded physical evidence found in the dwelling which would not have been found in the dwelling but for the illegal entry is suppressible as the direct fruit of the invasion of the privacy interest involved--the warrantless invasion of the dwelling. Evidence incident the person seized on probable cause--such as confessions, identifications, and physical evidence on the person--should not be viewed as the fruit of the unlawful invasion of the privacy of the home, but the lawful seizure of the person, so that no attenuation or "purged taint" analysis need be undertaken at all, other than the recognition that all

evidence pertaining to the person of the individual seized must be regarded as not having been "come by by exploitation of the primary illegality." See Wong Sun v United States, 373 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

To the distinction here drawn between fruits of an unlawful detention and fruits of an unlawful entry to achieve a lawful (probable cause based) detention it might be objected that "but for" the unlawful entry the detention, lawful in and of itself or not, would not have occurred, at least at the moment, and in the place, it did. As to the fact that it would not have occurred where it did, the violation of privacy of that place is remedied by suppressing physical evidence found on the premises; as to the fact that it would not have occurred at the precise time it did, there are no fruits at all; as to the fact that it

occurred at all, the detention itself was justifiable as based on probable cause. This Court in Wong Sun specifically declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police," the question instead being whether the evidence gained was "come by by exploitation of the primary illegality." The primary illegality here was the unlawful entry. Only physical evidence found on the premises can be said to be "come by by exploitation of the primary illegality (the entry into the dwelling)--evidence related to the person, including confessions, is come by by exploitation of the probable cause based arrest, and assuming no constitutional violation in its acquisition (in the case of a confession, that it is not involuntary),

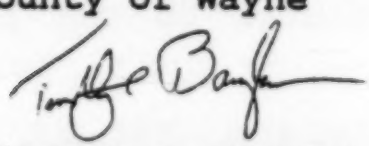
there is simply no fruit of the primary illegality at all.

CONCLUSION

WHEREFORE, amicus requests that the judgment of the court below be reversed.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



Timothy A. Baughman
Chief of Research, Training
and Appeals

MOTION

No. 88-1000

In The
Supreme Court of the United States
October Term, 1988

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

--against--

BERNARD HARRIS,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

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MOTION OF AMICI CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., *et al.,* and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over seventy-five times in the Supreme Court of the United States, and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication,

and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

2. *Desirability of an Amici Curiae Brief. Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, conducting interrogations, and investigating reports of crimes on and off premises, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel -- we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA and NSA are national associations, and their perspective is nationwide. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of search and seizure and interrogation. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the clerk of this Court. This Motion is necessary because the Respondent has not as of the time of printing of the Brief granted consent to *amici* in writing. Should it be received thereafter, it will be filed with the clerk of this Court with a request that this motion be withdrawn.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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Telephone: (312) 858-6392
Counsel for Movant Parties,
Amici Curiae

INTEREST OF AMICI

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ARGUMENT

I

THE COURT BELOW ERRONEOUSLY CONSTRUED THE FOURTH AMENDMENT BY HOLDING THAT THE WARRANTLESS ARREST OF A MURDER SUSPECT IN HIS HOME, ALTHOUGH BASED ON PROBABLE CAUSE, BY ITSELF, REQUIRES THE EXCLUSION FROM EVIDENCE OF HIS VOLUNTARY CONFESSION, GIVEN WITH FULL COMPREHENSION OF THE *MIRANDA* WARNINGS, ABOUT ONE HOUR LATER AT A POLICE STATION.

The girlfriend of respondent (hereinafter referred to as "defendant") was murdered and defendant became a prime suspect in her killing. After the police developed probable cause to believe that defendant had killed her, but without an arrest warrant, they went to question him at his home. The police knocked at the door, and, after some delay, defendant came to the door and asked, "Who is it?" A detective held his badge up to the peephole, and defendant then opened the door, stating, "I'm glad you came for me." After defendant's apparent consent to enter, he was given the *Miranda* warnings, and he stated that he understood his rights. He then invited the police officers to sit down and said that he was going to fix himself a glass of wine. A detective then sat down with him and told defendant that he wanted to talk to him about the death of his girl friend. After pouring the

wine, defendant stated that he loved her, but that she was not bringing up her child "right," and that he had killed her by cutting her throat with a knife.

Defendant was arrested and taken to the police station. About an hour after the arrest, the *Miranda* warnings were again read to him, he indicated that he understood them, and defendant dictated a confession to a police officer, who wrote it down as he spoke. Defendant read the confession, making one change by crossing out a section which stated that he had taken the murder weapon with him after the crime, correcting it to read that he threw the weapon away after the crime, and he then signed the confession as corrected by him.

The court below, *People v. Harris,* 72 N.Y.2d 614, 532 N.E.2d 1229 (1988), ruled that (1) the defendant's arrest without a warrant was in violation of *Payton v. New York,* 445 U.S. 573 (1980), and (2) the confession was not attenuated from the illegal warrantless arrest.

Amici will not discuss at length the case law analysis of the Petitioner State of New York in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence.

Amici, with our close association with the police community, know that police officers enter private homes for a variety of lawful reasons--*e.g.,* to serve a warrant, to answer a call of distress, to take a routine report, or to render another service.

In some circumstances the police may enter to make an arrest without a warrant. If they have consent of the person, no violation of the rule in *Payton v. New York*

occurs. On the record of this case it would appear that the defendant--in telling the police that he was "glad you came for me," immediately opening the door, inviting the police to sit down, and casually pouring a glass of wine while he talked--consented to the police entry. At the very least, a police belief that consent had been given would be objectively reasonable in the totality of the circumstances within the purview of *United States v. Leon*, 468 U.S. 981 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). Although the issue of consent was not resolved by the lower courts in this case, *amici* submit that the record would warrant disposition of this case on that basis; if not consent, *amici* submit that the record well supports a conclusion that the officers acted in good faith.

If this Court concludes that a *Payton* violation occurred, *amici* submit that the three attenuation factors delineated in *Brown v. Illinois*, 422 U.S. 590 (1975) have been adequately met in this case.

I. *The presence of Miranda warnings.*

Unquestionably, the warnings were given before the defendant's incriminating statements at his home and at the station house and he freely and voluntarily waived his rights. The record below indicates a person who was not only willing to confess, but eager to do so ("I'm glad you came for me"). While it is true that *Miranda* warnings alone would not dissipate any taint, *Dunaway v. New York*, 442 U.S. 200 (1979), the fact that they were given and that the defendant was waiting for the police to unburden himself of his guilt, should be sufficient to dissipate the taint in this case.

Amici submit that this Court should adopt a "bright line" rule for police guidance to the effect that where a technical *Payton* violation has occurred, the police may

take a confession where the suspect has been *Mirandized* and is *desirous of confessing*. As police administrators, *amici* believe that a contrary rule would, as noted by the dissenting Chief Judge below, "encourage more intrusive and dangerous police conduct . . . [such as] the questioning of suspects before probable cause is obtained." 72 N.Y.2d 630. Such a bright line rule would make unnecessary the consideration of the following additional *Brown* criteria.

II. *The temporal proximity of the arrest and the confession, and any intervening circumstances.*

While it is true that most of the cases that have applied this factor put great weight on increased time after a Fourth Amendment violation, see the cases collected at 4 LaFave, Search and Seizure, Sec. 11.4[b], pp. 397-398, 2nd Ed., and pp. 25-27, 1989 Suppl., *amici* submit that the time element is an elusive factor at best, and that a rule that "more time is better" is of little guidance to the police and potentially misleading. As noted by Justice Stevens in his concurring opinion in *Dunaway*:

> The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. *Conversely, even an immediate confession may have been motivated by a prearrest event such as a visit with a minister.* (emphasis added)

442 U.S. at 220.

Amici believe that in this case a "prearrest event" is amply demonstrated by defendant's unequivocal

statement that he was waiting for the police arrival at his home and was "glad" to see them. Clearly, the defendant had contemplated the consequences of his deed and had decided to confess before the police arrival. The "prearrest event" in this case was the defendant's internal rationalization process, not unlike that recognized by this Court in *Colorado v. Connelly,* 479 U.S. 157 (1986). If anything, the shortness of time in this case -- less than an hour -- points to the defendant as the sole source of the confession, unbroken by any *Payton* error.

Amici note, moreover, that any further support to the "more time is better" rationale of the cases will do little to guide police conduct in this area. Such a rule is constantly shifting in its application according to the circumstances of a given case. The police are torn between the desire to attenuate any possible taint and the demands of a suspect -- as here -- who wants to confess. In such a situation the police do not know whether to wait -- and how long -- or address the suspect's willingness to confess. *Amici* submit that better guidance from the Court would be a clear statement that the proximity of the arrest and the confession in *Payton* violation cases is to be given minimal value.

The mischief of the "more time is better" rationale is well illustrated by the facts of this case. In order to seemingly satisfy the emphasis put upon "more time is better" in the cases, the police would have been faced with a host of possible activities and choices. Should they have told the defendant that he could *not* confess because not enough time had elapsed? Should they have delayed any interrogation and, if so, how long? Two hours, four hours, six hours, etc.? In the interim, should they have persuaded the defendant to engage in a series of possibly attenuating activities, such as calling a friend, a relative, a minister, eat a full course meal of his choice, watch a movie on TV, etc.?

Amici submit that in the face of a defendant who, as here, is eager and willing to confess, encouraging the police to engage in meaningless attenuation activities is not only not constitutionally required but would encourage forms of mechanical compliance with the *Brown* rule that would do little to further the spirit of that rule. A better approach would be a "bright line" rule that, in cases where the defendant is predisposed to confess, the police may take a confession from him after *Miranda* prerequisites have been satisfied.

III. *The flagrancy of the police misconduct.*

This factor is related to the deterrence rationale that underpins the Court's continued maintenance of the exclusionary rule in Fourth Amendment cases. It is a rationale that *amici* support in order to discourage violations of Fourth Amendment rights.

We submit, however, that as one commentator has noted, "[t]o maximize the policy of deterrence, the fourth amendment exclusionary rule should be most strictly applied in cases where flagrantly unacceptable police activity has occurred." Comment, 13 Houston L. Rev. 753, 767-68 (1976).

The comments of Chief Judge Wachter in this case on this factor are amply supported by the trial record and findings of the intermediate appellate court, *People v. Harris,* 124 A.D.2d 472, 507 N.Y.S.2d 823 (1st Dept. 1986):

> Defendant was expecting the arrival of the police, as shown by his reaction that he was "glad" when they got there. Nor can it reasonably be inferred that defendant was feeling any police coercion as he fixed himself

> a glass of wine to make himself more comfortable, and then explained how he had both loved his girlfriend and killed her. These are not the statements and actions of a man reacting to police coercion or illegality; on the contrary, these facts portray a man who quite independently had decided to confess before the police arrived, and whose decision, therefore, was formed independently from any illegal police conduct.

72 N.Y.2d at 629.

Indeed, *amici* believe that the Fourth Amendment violation here is at most arguable, in addition to illustrating an absence of police coercion. If the defendant had been arrested anywhere else, the admissibility of his confession would not be questioned.[1] As noted by one court in rejecting a *Payton* violation as a basis for excluding a voluntary confession, "the location of the arrest . . . did not bear so much as a 'but for' relationship to the confession, which would plainly have come about regardless of the impropriety." *State v. Thomas,* 405 So. 2d 462 (Dist. Ct. of Apps. 3d Dist. 1981), *pet. for rev. dsmd.,* 419 So. 2d 1200 (Sup. Ct. Fla. 1982). To the same effect, see *Thompson v. State,* 248

[1] *Amici* note that although the court below did not allude to it, there may have been a state law basis -- as opposed to an intentional federal constitutional violation -- for the police failure to obtain a warrant in this case. In order to obtain an arrest warrant in New York, the police must first file an "accusatory instrument." Under the New York rule in *People v. Samuels,* 49 N.Y.2d 218 (1980), once an accusatory instrument has been filed in that state, the police cannot interrogate a defendant in the absence of counsel.

Ga. 343, 285 S.E.2d 685 (1981).

To apply the exclusionary rule in this case, where probable cause existed and the police could have arrested the defendant anywhere but his home, would not only not further the goal of deterrence, but would undermine the salutary purposes of the rule in preventing police misconduct. This is not an appropriate case for the application of the exclusionary rule of *Brown v. Illinois* and *Dunaway v. New York.*

II

THIS COURT SHOULD MODIFY THE RULE IN *BROWN v. ILLINOIS* AND ADOPT A BRIGHT LINE RULE THAT THE POISONOUS TREE DOCTRINE AS APPLICABLE TO VIOLATIONS OF *PAYTON v. NEW YORK* IS RESERVED FOR CASES WHERE THERE HAS BEEN A FORCIBLE ENTRY AND LACK OF PROBABLE CAUSE.

Brown v. Illinois, 422 U.S. 590 (1975), was a case involving a forcible entry of a defendant's apartment by the police and a lack of probable cause. The facts of that case were especially egregious, in that the police broke into Brown's apartment and searched it without a warrant in his absence, accosted him with drawn guns when he arrived at the apartment, and arrested him without probable cause. He was then taken to the stationhouse and interrogated until he confessed.

Brown was in fact a far different case from the instant one. Not only were the police told by this defendant, "I'm glad you came for me" when he opened his door in response to the police arrival at his apartment, but it was found below that the police had ample probable cause for defendant's arrest. The defendant was so relaxed in his relationship with the police that he poured himself a glass of wine before he began to narrate why and how he

had killed his girlfriend. The instant case is so different from *Brown* on its facts that application of the *Brown* poisonous tree doctrine could hardly have been contemplated by the *Brown* Court. The deterrent effect of application of that doctrine to this case is illusory at best.

Amici submit that this Court should refrain from applying *Brown* to cases such as this. **We ask this Court to adopt a bright line rule for the police and the courts to the effect that the poisonous tree doctrine is not applicable to confessions otherwise admissible and received after *Payton* error where the police entry is accomplished without force (or threat of force) and the defendant is arrested with probable cause.**

CONCLUSION

Amici respectfully request this Court to reverse the decision of the New York Court of Appeals on the basis that (1) the defendant consented to the entry of his home, (2) any *Payton* taint was sufficiently attenuated in this case, (3) the time element for attenuation is of minimal importance in such cases and in this case was satisfied, (4) *Brown v. Illinois* is not applicable to *Payton* violation cases where the police entry has been non-forcible and the arrest has been with probable cause, and (5) in any event, the police acted in good faith within the purview of the good faith exception to the exclusionary rule recognized in *United States v. Leon,* 468 U.S. 897 (1984) and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

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AMICUS CURIAE

BRIEF

No. 88-1000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NEW YORK,

Petitioner,

v.

BERNARD HARRIS,

Respondent.

**ON WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK**

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Did the New York Court of Appeals err in concluding that, within the framework of New York law governing the arrest and interrogation of criminal suspects, the suppression of a statement taken at the station house shortly after an arrest made in flagrant violation of *Payton* v. *New York* was necessary to deter a police custom of making such unconstitutional arrests?

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Barrington D. Parker, Jr., Esq., submits this brief pursuant to the Order of this Court dated August 25, 1989, in which he was "invited to brief and argue this case, as *amicus curiae*, in support of the judgment below."

STATUTORY PROVISIONS

Citations to Constitutional provisions are set forth at page 2 of Petitioner's Brief on the Merits. In addition, the following statutes are pertinent to this case:

New York Criminal Procedure Law (McKinney 1981)

§ 120.10 Warrant of arrest; definition, function, form and content

1. A warrant of arrest is a process issued by a local criminal court directing a police officer . . . to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument.

§ 1.20 Definitions of terms of general use in this chapter

* * *

17. "Commencement of criminal action." A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court . . . .

STATEMENT OF THE CASE

After dark on the evening of January 16, 1984, New York City detectives went to the home of respondent Bernard Harris to question and arrest him for a homicide committed five days earlier. Although the detectives had probable cause to arrest Harris and intended to arrest him at home, they chose not to obtain an arrest warrant because, as conceded by the veteran detective in charge of the investigation, it was still the custom of the New York City Police Department—four years after *Payton* v. *New York*, 445 U.S. 573 (1980)—not to obtain one. (J.A. 10)

New York police have apparently chosen not to comply with *Payton* because under the New York Criminal Procedure Law an arrest warrant cannot be obtained unless an accusatory instrument is filed. *See* N.Y. Crim. Proc. Law § 120.10(1) (McKinney 1981). That filing commences a criminal action and triggers a right to counsel that, under the New York Constitution, cannot be waived except in the presence of counsel. *People* v. *Samuels*, 49 N.Y.2d 218, 221-22, 400 N.E.2d 1344, 1346-47, 424 N.Y.S.2d 892, 894-95 (1980).

Thus, the issue for this Court is whether the New York Court of Appeals erred in concluding that suppression of a statement that closely follows an illegal home arrest is necessary to deter the New York City Police Department's acknowledged custom of violating *Payton*, a custom apparently motivated by a desire to circumvent New York law governing the circumstances under which suspects can be interrogated.

Respondent's warrantless arrest produced three incriminating custodial statements: the first just after the police, according to Harris, "barged into the apartment with their guns on [him]," threatening to kill him if he did not confess (J.A. 26); a second approximately one hour later after Harris had been taken under guard to the precinct and subjected to further interrogation (J.A. 16-18, R. 252, 253); and a third that was videotaped after midnight that evening. (J.A. 35, R. 135) Only the second statement is at issue here.[1]

A. The Police Investigation Of The Death Of Thelma Staton

On January 11, 1984, Ms. Thelma Staton was found dead in her Bronx, New York, apartment. That same day, Detective Willrick Rivers, an 18-year veteran of the New York City Police Department and a detective for 13 years, went to her apartment to investigate. (J.A. 2)

After talking to Staton's daughter and boyfriend, Detective Rivers identified respondent as a likely suspect. (J.A. 3-6) Rivers learned that four days before the homicide Harris had apparently forced the decedent at gunpoint from the house of another boyfriend, Herbie Stultz, where she had been staying. In Staton's apartment Detective Rivers found her diary, which contained a summons charging Harris with harassment and a

[1] The first was properly suppressed by the trial court as the product of an illegal arrest. The third was suppressed by that court because it derived from interrogation that continued after Harris indicated a preference not to be questioned further.

notation concerning Harris's removing her from Stultz's apartment. (J.A. 4)

Staton's daughter also told Detective Rivers that she had overheard a conversation in which her mother had told Harris that she did not want to speak to him again and wanted him to stop bothering her. (J.A. 4, 5) Finally, Detective Rivers learned that the bedroom where Staton's body had been found had been locked from the outside, that Harris had installed the lock, and that Staton and respondent had the only keys. (J.A. 4, 5) Later that night at the precinct Detective Rivers learned from the decedent's boyfriend that she had told him she was afraid that Harris might attempt to hurt her. (R. 38) Thus, by the night of January 11, five days before Harris's arrest, investigating officers had probable cause to obtain an arrest warrant.

B. Respondent's Arrest

At approximately 6:30 p.m. on the night of January 16, 1984, Detective Rivers went to Harris's apartment accompanied by two other 18-year veterans of the Police Department, Detective John McCarthy, who had been a detective for five years, and Police Officer John Egan. They did not have an arrest warrant. (J.A. 11)

Detective Rivers testified about his purpose as follows:

THE COURT: Apart from wanting to talk, to find Mr. Harris and talk to Mr. Harris, did you intend to arrest Mr. Harris?

THE WITNESS: Mr. Harris was a suspect at the time.

THE COURT: That is not the question I gave you. Did you intend to arrest Mr. Harris? I will put it this way, since you are hesitating, you knock on the door, Mr. Harris answers. You say, police. He does not want to talk to you. Would you just walk away or would you take him into custody?

THE WITNESS: I would have taken him into custody for questioning, your Honor.

(R. 67, J.A. 6)

Similarly, Detective McCarthy testified that he went to respondent's apartment knowing that Detective Rivers intended to arrest Harris:

THE WITNESS: I was going there to assist Detective Rivers—

THE COURT: We know that Detective Rivers was going to attempt to take Mr. Harris in custody. Did you know?

THE WITNESS: I didn't know that, your Honor.

THE COURT: You didn't know that?

THE WITNESS: No.

Q. [DEFENDANT]: Wo [sic] you went on a trip and you didn't—

THE COURT: Did you know he was a suspect in a homicide?

THE WITNESS: Yes.

THE COURT: Did you know that Rivers intended to pick him up?

THE WITNESS: Yes. Yes.

THE COURT: All right. Come on. Let's not play games.

(R. 156, J.A. 7)

Detective Rivers testified that he made no attempt to obtain a warrant to arrest Harris at home because it was the custom of

the New York City Police Department not to get warrants for such arrests.[2]

When the detectives arrived at Harris's apartment, they surrounded it, with Detectives Rivers and McCarthy positioning themselves at the front door. Both detectives testified that they had their guns drawn. (J.A. 12, 13) Officer Egan testified that he climbed down the fire escape to the back window of the apartment. (J.A. 14)

According to Harris's trial testimony, McCarthy and Rivers barged into the apartment with their guns drawn and trained on him. When asked whether he was Bernard Harris and whether he lived alone, he answered affirmatively. The two detectives took him into the foyer of his apartment, threw him up against the wall and searched him. They "held me by the collar of my jacket, and then took me into my bedroom." Detective McCarthy asked respondent if he knew Thelma Staton was dead and stated, "You'd better tell me you slash her —slashed her." Harris further testified:

> In the meantime, I'm alone in the apartment. I said I didn't know anything. He [McCarthy] said, "You slashed her." Then he looked at me over his head: "You look like a nice guy. Make it easy on yourself. Before I got to you, I planned to blow off your head." He repeated again: "You're a nice guy. Do yourself a favor." And I looked at him and I said, "I slashed her."

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[2] THE COURT: In your department is it customary to get warrants?
THE DEFENDANT: Or not.
THE DEFENDANT [sic, RIVERS]: No, your Honor.
THE COURT: He says, no.
Q. [DEFENDANT]: It's not your custom to get warrants?
A. [RIVERS]: No.
Q. [DEFENDANT]: You never get a—attempt to?
THE COURT: He did not say, never. He said it was not the custom.
(J.A. 10)

(J.A. 26, 27)[3]

C. Respondent's Statements At The Precinct

The police testified that after about fifteen minutes in Harris's apartment they took him to the precinct, ten or fifteen minutes away. (J.A. 17) About one hour after his arrest, Harris was again interrogated by Detective McCarthy. During that hour he had no contact with family, friends or counsel. Detective McCarthy testified that, after he read Harris the *Miranda* warnings, Harris made an inculpatory statement that the detective wrote and Harris corrected and signed. (J.A. 18)

Later that night, a prosecutor and a videotape crew arrived at the precinct. About midnight, the prosecutor read Harris the *Miranda* warnings and interrogated him again. When asked whether he wanted to talk about the death of Staton, Harris said, "Well, I really don't know what to say right now." When the prosecutor continued questioning him, Harris said that he had been talking all night long and "at this moment I have said all I can say." Nevertheless, the prosecutor continued the interrogation. (R. 225)

D. The Decision At The Suppression Hearing

Prior to trial, Harris moved to suppress the statements elicited by the police. After a hearing, the court ruled that the

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[3] This testimony was not consistent with that of the detectives, who claimed at the suppression hearing and at trial that they had used no force, that Harris had been friendly when they arrived, and that Harris had been read *Miranda* warnings before saying that he had killed Staton. (J.A. 11, 15) According to Detective Rivers, in response to their knocking Harris said, "Come inside. I'm glad you came for me." (J.A. 15) Detective Rivers also testified that Harris asked the police to be seated while he poured himself a glass of wine. (J.A. 16, R. 151) Harris, however, testified that he was drinking wine because it was his birthday and he was expecting friends, but that once the police began interrogating him, they brought him the bottle and encouraged him to continue to drink. (R. 512-16)

detectives had had probable cause to arrest respondent, that the detectives had gone to respondent's apartment to take him into custody and that the prosecutor's argument that their purpose had been to investigate was "clearly nonsense." (J.A. 19) The court concluded that when the officers arrived at the apartment, knocked on the door with drawn guns and took Harris into custody, "no more clear violation" of *Payton* could be established. Accordingly, the court suppressed the first statement. (J.A. 19, 20)

Even though the court found a clear violation of *Payton*, it held the second statement admissible on the ground that there was sufficient attenuation from the illegal arrest. The court suppressed the videotaped statement because the prosecutor had ignored Harris's requests that the interrogation not proceed. (J.A. 20, R. 224, 225)

E. The Trial

Respondent waived his right to a trial by jury, and his nonjury trial commenced on February 20, 1985. With the assistance of a legal advisor, Harris represented himself at trial, as he had done at the suppression hearing.

Harris's statement at the precinct was admitted at trial and constituted the State's main evidence. The fingerprints found at the crime scene could not be matched to respondent's, there were no eyewitnesses, and the prosecution did not introduce the murder weapon or the keys to Staton's bedroom, apparently because they were never recovered. (R. 393, 554-57)[4]

On February 25, 1985, the court found Harris guilty of intentional murder. With respect to the station-house statement, the trial court adhered to its earlier ruling that there was

[4] Detective Rivers testified at trial, as did respondent. The prosecution also called the police officer who found Staton's body, Staton's daughter, two of Staton's friends, and an Associate Medical Examiner. Staton's mother and a Medical Investigator employed by the Medical Examiner's office testified on behalf of Harris.

sufficient attenuation to purge the taint of the illegal arrest. (J.A. 27, 29)

F. The Decisions Of The Appellate Division And The New York Court Of Appeals

The Appellate Division affirmed, without a majority opinion. Two of the concurring justices agreed with the trial court that respondent's arrest violated *Payton*. (J.A. 30) They concluded, nevertheless, that "there was an adequate basis for the trial court to conclude that the police-station statement was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion,'" but called the question "a close one." (J.A. 30)[5] In dissent, Justice Rosenberger agreed that there had been a *Payton* violation, but concluded that the second statement should also have been suppressed:

> There was no reasonable explanation for the failure to obtain a warrant. Under existing law, an arrest warrant cannot be issued until an accusatory instrument has been filed (CPL art 120). Once an accusatory instrument has been filed a defendant may not be questioned in the absence of counsel. Quite possibly, the detectives may have felt it more expedient to arrest the defendant summarily, rather than seek a warrant, in light of the restrictions on questioning.

(Citations omitted.) (J.A. 37, 38)

Harris appealed to the New York Court of Appeals, which held that it was error to have admitted the second statement and reversed. Relying on the factual findings of the trial court, which the Appellate Division had left undisturbed, the Court of Appeals held that "[u]nder the rule of *Payton*, this arrest was clearly illegal, as the courts below found, and it only remains to determine the consequences of the illegal police conduct."

[5] Two other justices concurred on the ground that Harris had consented to the entry, or alternatively, that the lapse of time and rereading of the *Miranda* warnings dissipated the taint of the illegal entry. (J.A. 33, 34)

(J.A. 43) Applying the factors set forth in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the Court of Appeals held that the shortness of time between the arrest and the station-house statement was ambiguous and that no intervening event other than *Miranda* warnings occurred between the illegal arrest and the statement.

Turning to the third factor, the court reached the disturbing, but fully supported, conclusion that the *Payton* violation had been both purposeful and flagrant:

> In the case before us, the trial court found the police went to defendant's apartment to arrest him and, as the police conceded, if defendant refused to talk to them there they intended to take him into custody for questioning. Nevertheless, they made no attempt to obtain a warrant although five days had elapsed between the killing and the arrest and they had developed evidence of probable cause early in their investigation. Indeed, one of the officers testified that it was department policy not to get warrants before making arrests in the home. From this statement a reasonable inference can be drawn, as the dissent below did, that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession (*see*, 124 A.D.2d 472, 478). Thus, the police illegality was knowing and intentional, in the language of *Brown* (*supra*, at 605), it "had a quality of purposefulness," and the linkage between the illegality and the confession is clearly established.

(J.A. 46, 47)

This Court granted certiorari on April 17, 1989.

SUMMARY OF ARGUMENT

The New York Court of Appeals correctly concluded that the suppression of Harris's station-house statement was necessary to deter violations of *Payton* that were the custom of New York police and were calculated to avoid restrictions on custodial interrogation imposed by New York law.

Payton is grounded on principles that this Court has consistently recognized to be at the core of the Fourth Amendment: that a person has the right to be secure in his home; that an arrest in the home is an especially serious invasion of personal privacy; and that the scope of the Amendment's protection is defined by legitimate expectations of privacy, not by the physical confines of the home itself. Here, the police deliberately violated these principles, and that violation was particularly flagrant because it was dictated by the custom of their department.

In order to deter such violations, all tainted evidence derived from a warrantless home arrest, whether tangible or testimonial, whether seized inside or outside the home, must be suppressed. Relaxation of that rule would only encourage police to violate *Payton* and would permit them to do so with impunity. As this case graphically demonstrates, suppressing only tangible evidence would create no incentive to comply with *Payton* in the many instances where the police are primarily seeking incriminating statements. Suppressing only evidence seized inside the home would not deter police from effecting warrantless home arrests and then immediately bringing a suspect outside for questioning, or remaining outside and forcing a suspect across the threshold. The best approach both finally to ensure compliance with *Payton* and to limit deterrence to those cases where it is efficacious, is to continue to use the well-settled attenuation analysis articulated in *Brown*, applied here by the New York Court of Appeals and repeatedly used by this and other courts.

Respondent's station-house statement was derived from his illegal arrest and the causal connection between the constitutional violation and the statement was direct and unbroken. Under traditional attenuation analysis, suppression is required because the police conduct was purposeful and flagrant, the statement and illegal arrest were separated by only one hour, and no intervening events other than *Miranda* warnings occurred between the illegal arrest and the statement.

Accordingly, the New York Court of Appeals properly concluded that, in the context of New York law, suppression was necessary to achieve compliance with the Fourth Amendment.

Finally, this Court should not disturb the factual finding below that Harris did not consent to the police entry into his apartment, because the record supports that finding and therefore no exceptional circumstances exist.

ARGUMENT

I. RESPONDENT'S STATION HOUSE STATEMENT WAS PROPERLY SUPPRESSED TO DETER THE VIOLATIONS OF *PAYTON* V. *NEW YORK* THAT ARE CUSTOMARY IN NEW YORK.

New York's highest court correctly decided that the exclusion of respondent's station-house confession was necessary to deter the systematic *Payton* violations admitted to by the police. This Court should affirm, because (a) the New York Court of Appeals is best able to determine the necessity of suppression as a deterrent to New York police who are motivated to violate *Payton* by restrictions on interrogation arising under New York law; (b) *Payton* protects important interests that are based on the right to be free from unreasonable governmental intrusion into the home; and (c) *Payton* violations can most efficiently be deterred by continuing to apply the attenuation analysis of *Brown* v. *Illinois*.

A. The Court Below Found That Respondent Was Arrested In Violation Of *Payton* As A Deliberate Device To Avoid The Consequences Of Complying With Federal And State Law.

Under New York's Criminal Procedure Law, an arrest warrant can issue only after an accusatory instrument has been filed. N.Y. Crim. Proc. Law § 120.10(1) (McKinney 1981). The filing of an accusatory instrument commences criminal proceedings and triggers the right to counsel. N.Y. Crim. Proc. Law § 1.20(17) (McKinney 1981); *People* v. *Settles*, 46 N.Y.2d

154, 165, 385 N.E.2d 612, 617-18, 412 N.Y.S.2d 874, 880-81 (1978). That right cannot be waived in the absence of counsel. *People* v. *Samuels*, 49 N.Y.2d 218, 221-22, 400 N.E.2d 1344, 1346-47, 424 N.Y.S.2d 892, 894-95 (1980). In other words, if New York police obtain an arrest warrant, they cannot question a suspect without counsel present, absent a waiver of the right to counsel that itself must be made in the presence of counsel.[6]

The New York Court of Appeals recognized the significance of this New York law, and observed that the police had made no attempt to obtain a warrant even though they had developed probable cause days earlier and that it was department policy not to do so. The court concluded that "a reasonable inference can be drawn . . . that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession." (J.A. 46)

That "reasonable inference" is fully supported by a record devoid of any indication of exigent circumstances, inadvertence or misperception of controlling law. The arresting officers were veterans who undoubtedly knew that a warrant was necessary for a home arrest. They also knew that, if they obtained one, they could not question Harris in the absence of his attorney and that an attorney, in all probability, would instruct Harris not to talk to the police.

The highest court in New York is best able to evaluate how *Payton* interacts with New York criminal procedure and to determine the necessity of suppressing statements to ensure compliance with *Payton* by New York police officers. That court's resolution of these issues is entitled to great deference,

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[6] New York apparently wants these requirements to remain in place. After *Payton*, attempts were made to overrule *People* v. *Samuels* through legislation. Those attempts were unsuccessful. *See* Bellacosa, Practice Commentary to N.Y. Crim. Proc. Law § 120.10 at 111-12 (McKinney 1981).

and should be accepted unless it affronts principles or policies rooted in the Fourth Amendment. *See Reitman* v. *Mulkey*, 387 U.S. 369, 373-74 (1967). Below, we demonstrate that this resolution is a correct one that promotes, rather than offends, the Fourth Amendment principles underlying *Payton* and the long line of decisions from *Brown* v. *Illinois*, 422 U.S. 590 (1975), through *Lanier* v. *South Carolina*, 474 U.S. 25 (1985) (per curiam).

B. The Protections Afforded By *Payton* Are Not Based On Property Rights, But On The Fourth Amendment Right To Be Secure From Unreasonable Governmental Intrusion Into The Home.

Payton v. *New York* holds that absent exigent circumstances the police may not arrest a suspect in his home without first obtaining an arrest warrant because

> [a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

Payton v. *New York*, 445 U.S. at 589-90 (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)); *see also United States* v. *Johnson*, 457 U.S. 537, 552 n.13 (1982) ("the Fourth Amendment accords special protection to the home").

Payton, of course, was not new or anomalous in holding that the Fourth Amendment protects expectations of privacy in the home. Elsewhere, and with frequency, this Court has emphasized that the Fourth Amendment "was intended to protect the 'sanctity of a man's home and the privacies of life.'" *Stone* v. *Powell*, 428 U.S. 465, 482 (1976) (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)). Recognizing the importance of these principles, the Court has afforded "the sanctity of private dwellings . . . the most stringent Fourth Amendment protection," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976), and "consistently has been most protective of the privacy of the dwelling," *Wyman* v. *James*, 400 U.S. 309, 316 (1971).

Payton is also based on the idea that an arrest at home is a greater invasion of privacy than an arrest elsewhere:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."

Payton v. *New York*, 445 U.S. at 589; *id.* at 603 (Blackmun, J., concurring).

As a result, *Payton* recognized that an arrest or search in the home is qualitatively different from the same event elsewhere. *Payton* v. *New York*, 445 U.S. at 586 n.25, 589 (citing *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-75 (1971)). The dissent in *Payton* identified that distinction as the basis for the Court's decision: "Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy." *Payton* v. *New York*, 445 U.S. at 615 (White, J., dissenting).

In protecting the zone of privacy of the home, however, this Court has not simply protected property interests, because it is well settled that the Fourth Amendment "'protects people, not places,' more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977) (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)). Indeed, the Court has repeatedly rejected "the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980); *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978); *Silverman* v. *United States*, 365 U.S. at 511. "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, . . . for an actual trespass is neither necessary

nor sufficient to establish a constitutional violation." *United States* v. *Karo*, 468 U.S. 705, 712-13 (1984).

Some years ago, Justice Harlan explained why the protection provided by the Fourth Amendment is not conterminous with property rights:

> [I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

Poe v. *Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting); *see also California* v. *Ciraolo*, 476 U.S. 207, 212-13 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."); *United States* v. *Dunn*, 480 U.S. 294, 301 (1987) ("[T]he centrally relevant consideration [in curtilage cases is]—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection.").

Payton bars illegal entry into the home, but not to protect property or personal possessions. *Payton* protects a person's right to retreat into his home, free from intrusion into the attendant privacy he can expect there, unless that intrusion is authorized by a neutral magistrate. Here, New York police intentionally violated that right.

C. Evidence Derived From A Warrantless Home Arrest, Whether Seized Inside Or Outside The Home, Must Be Suppressible If Violations Of *Payton* Are To Be Deterred.

The primary purpose of the exclusionary rule is, of course, to deter violations of the Fourth Amendment.[7] Consequently,

[7] The exclusionary rule cannot remedy a Fourth Amendment violation, since "[i]t is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Stone* v. *Powell*, 428 U.S. at 486 (quoting *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965)). Rather, the rule safeguards Fourth Amendment rights through its deterrent effect. *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *United States* v. *Leon*, 468 U.S. 897, 906 (1984).

this Court has emphasized that exclusion is appropriate to "alter the behavior of individual law enforcement officers or the policies of their departments." *United States* v. *Leon*, 468 U.S. 897, 918 (1984). If compliance with *Payton* is desirable, as unquestionably it is, then both the behavior of the detectives in this case and the policy of their department must be altered. This goal can be achieved only if all primary evidence and all "derivative evidence, both tangible and testimonial, that is the product of the primary evidence" continues to be subject to suppression. *Murray* v. *United States*, 108 S. Ct. 2529, 2532-33 (1988).

To law enforcement officials, confessions are frequently as important as, if not more important than, tangible evidence.[8] The police had not found the murder weapon or the key to Staton's bedroom. They had no eyewitnesses, and the fingerprints at the scene were inconclusive. Although Detective Rivers had probable cause to arrest Harris, it was based primarily on the hearsay statements of the victim, which would

[8] *See* F. Inbau, J. Reid & J. Buckley, *Criminal Interrogation and Confessions* xiv (3d ed. 1986) ("Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects."); Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Col. L. Rev. 1137, 1140 (1987) ("So, either inculpatory words or demonstrably false denials from the mouth of the suspect are among the surest tickets to conviction. Naturally, evidence of this character exerts a strong attraction on the government's investigators."); *see also* D. Rutledge, *Criminal Interrogation: Law and Tactics* 5 (1987).

have been inadmissible at trial. Assuming, as the record indicates, that to make their case the police went to Harris's home hoping to obtain a statement after arresting him, they would have been entirely undeterred from violating *Payton* by a rule suppressing only tangible evidence.[9]

Similarly, law enforcement officers would not be deterred from warrantless home arrests by a rule that constricts the exclusionary rule for *Payton* violations to evidence seen, seized or heard within the physical confines of the home. The police will never be deterred from arresting an individual at home in hopes of obtaining an incriminating statement if they only have to walk outside before they begin their questioning. Their interrogation of the suspect in the hallway, on the front steps, or in the police car would invariably include questions about evidence in the home, and the information learned from the suspect could be used to obtain a search warrant.

Alternatively, the police could surround a suspect's home and order him across the threshold at gunpoint. Courts have consistently condemned that practice as violative of *Payton*. *See, e.g.*, *United States* v. *Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States* v. *Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986); *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985). If the new restrictions on the exclusionary rule proposed by the State and the Solicitor General were adopted, then Fourth Amendment violations like those in *Maez*, *Al-Azzawy* and *Morgan* would be illegal, but insulated from judicial sanction.

Basing the admissibility of evidence derived from a warrantless home arrest solely on whether it was seized within or beyond the arbitrary line of the front door is both over- and under-inclusive. Such a rule would require suppression of

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[9] The Solicitor General's proposal that only evidence *observed* in the home should be suppressed and that even Harris's *first* statement should be admissible would provide absolutely no deterrence in such cases and would eviscerate *Payton*. (Sol. Gen. Br. 6, 15)

statements like those in *Rawlings* v. *Kentucky*, 448 U.S. at 106, which were made in a home after an illegal arrest, but were admissible because they were attenuated. It would deny suppression of obviously tainted statements made immediately after the illegal arrest but just after a suspect, such as Maez, was forced from his home.[10] Such a rule would also mean that there would be no way to deter violations of *Payton* where the only evidence sought from the suspect was fingerprints, *Hayes* v. *Florida*, 470 U.S. 811 (1985), a breath test, *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984), fingernail scrapings, *Cupp* v. *Murphy*, 412 U.S. 291 (1973), or a blood sample, *Schmerber* v. *California*, 384 U.S. 757 (1966).

Instead of focusing on the importance of deterrence, petitioner contends that application of the *Brown* attenuation analysis is premised on the fact that police custody of a person without probable cause is unconstitutional. Because in this case the police had probable cause to arrest Harris, the State and the Solicitor General argue that *Brown* is inapplicable. (Pet. Br. 10, 13-15; Sol. Gen. Br. 13, 14) This argument misconstrues the basis of *Brown*.

Given that the body of a defendant cannot be suppressed as the fruit of an illegal arrest, the admissibility of the statement

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[10] In *Maez*, the defendant's trailer was surrounded by police, FBI agents and a SWAT team who pointed rifles at the trailer and used loudspeakers to order Maez, who was inside his home with his wife and two-month-old baby, outside. Maez's wife watched from a window as the couple's 15-year-old son, who had been outside when the police arrived, was searched and handcuffed. She informed Maez of the events outside and he concluded, "We have to go outside . . . ." *United States* v. *Maez*, 872 F.2d at 1450. Once outside, Maez's wife consented to a search of the trailer and Maez consented to a search of a truck and made inculpatory statements. Finding the arrest illegal and applying the attenuation analysis of *Brown* v. *Illinois*, the court suppressed Maez's statement and held the consents given by Maez and his wife tainted by the illegal arrest. *United States* v. *Maez*, 872 F.2d at 1455-57.

in *Brown* v. *Illinois* could not have turned on the notion that the police, lacking probable cause, had custody of Brown's body illegally. To make illegal custody the predicate of *Brown* would be to assume that the Court in *Brown* was ignorant of constitutional rules dating back to *Ker* v. *Illinois*, 119 U.S. 436 (1886). *See Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952).

The real basis for *Brown* was the Court's recognition that an arrest is an event that brings significant pressures to bear upon the arrested person; that these pressures tend to undermine an arrested person's resistance to police interrogation; that the extent of these pressures is affected by the circumstances of the arrest; and that the arrest and its attendant circumstances cannot be compartmentalized as suggested by the petitioner and the Solicitor General.

Thus, in *Brown*, this Court emphasized the flagrant circumstances of Brown's arrest and the fact that the "arrest, both in design and in execution, was investigatory." *Brown* v. *Illinois*, 422 U.S. at 605; *see also Michigan* v. *Summers*, 452 U.S. 692, 702 n.15 (1981) (investigatory arrests "designed to provide an opportunity for interrogation [are] . . . likely to have coercive aspects likely to induce self-incrimination"). It was these important Fourth Amendment concerns that led this Court to suppress station-house confessions made even after *Miranda* warnings "unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (quoting *Brown* v. *Illinois*, 422 U.S. at 602).

The same suppression of evidence deemed necessary to deter illegal arrests in *Brown* is necessary to deter arrests that are illegal for lack of a warrant. While the arrests in *Brown* and in *Payton* were illegal for different reasons, they were offensive for the same reason. The coercive nature of both requires application of a meaningful exclusionary rule.

The New York Court of Appeals correctly held that the only way to deter violations of *Payton* while limiting the exclusionary rule to circumstances in which the cost of deterrence does not outweigh the benefits is to apply the well-settled law of attenuation. That concept "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *United States* v. *Leon*, 468 U.S. at 911 (quoting *Brown* v. *Illinois*, 422 U.S. at 609 (Powell, J., concurring in part)). That attenuation analysis has long been applied by this Court to all Fourth Amendment violations, whether they involved tangible or testimonial evidence, and was properly applied by the New York Court of Appeals.

II. THE PASSAGE OF ONE HOUR AND THE READING OF *MIRANDA* WARNINGS DID NOT DISSIPATE THE TAINT OF THE PURPOSEFUL AND FLAGRANT FOURTH AMENDMENT VIOLATION.

Brown v. *Illinois* requires suppression of respondent's station-house confession because the police misconduct was purposeful and flagrant, there was a short time interval between the arrest and the confession, and there were no intervening circumstances other than the reading of *Miranda* warnings. Unquestionably, the prosecution did not meet its burden of proving that the station-house statement was sufficiently attenuated from the illegal arrest. *See Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (citing *Dunaway* v. *New York*, 442 U.S. 200, 218 (1979), and *Brown* v. *Illinois*, 422 U.S. 590, 604 (1975)). Accordingly, the Court of Appeals was correct that suppression of the statement was necessary, within the framework of New York law, to deter future *Payton* violations.

A. The Police Misconduct Was Flagrant And Purposeful.

As demonstrated in Point I, above, the evidence of purposefulness and flagrancy is compelling. Almost four years after this Court's decision in *Payton*, the New York City police still routinely violated *Payton* by warrantless home arrests. They of course "had knowledge, or may properly be charged

with knowledge," *United States* v. *Peltier*, 422 U.S. 531, 542 (1975), of what *Payton* required.

Moreover, in this case, no exigent circumstances existed, *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984), the police did not act in good faith, *United States* v. *Leon*, 468 U.S. 897 (1984), and no other factors point to any exception to the well-established Fourth Amendment law enunciated by this Court. The flagrancy of the police misconduct here is nearly identical to that in *Brown* v. *Illinois:*

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

422 U.S. at 605 (citations omitted).[11]

The trial court correctly observed that there could be "[n]o more clear violation" of *Payton*, (J.A. 20) and the New York Court of Appeals properly concluded that "the police illegality was knowing and intentional, . . . it 'had a quality of purposefulness', and the linkage between the illegality and the confession is clearly established." (J.A. 46, 47) Those findings fully support the New York court's determination that Harris's

[11] In addition to the "quality of purposefulness" that characterized the police conduct in this case, there was also a calculated effort to surprise and intimidate Harris. Officer Egan climbed down the fire escape and banged on the window, displaying his gun, while the detectives, their weapons drawn, simultaneously banged on the front door. (J.A. 26)

statement was tainted by his illegal arrest and should not have been admitted at trial.

B. There Was Only A Short Time And No Intervening Circumstances Other Than *Miranda* Warnings Between The Illegality And The Statement.

Only an hour elapsed between respondent's illegal arrest and the station-house interrogation that produced the written statement. During that entire time, Harris was handcuffed and in the presence of at least three officers. (J.A. 16, 17; R. 507-11) There were no intervening events, other than *Miranda* warnings, that could have dissipated the taint of the illegal arrest. Harris was not freed from custody, *Wong Sun* v. *United States*, 371 U.S. 471 (1963), taken before a magistrate, *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), allowed to visit with friends, *Taylor* v. *Alabama*, 457 U.S. at 691, or kept in a congenial atmosphere, *Rawlings* v. *Kentucky*, 448 U.S. 98, 108 (1980).[12]

There was also no intervening event between the first confession, which was undoubtedly the product of an illegal arrest, and respondent's statement in the station house. *See Brown* v. *Illinois*, 422 U.S. at 605 & n.12; *Dunaway* v. *New York*, 442 U.S. at 218 n.20; *Darwin* v. *Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring), *approved in Robinson* v. *Tennessee*, 392 U.S. 666 (1968) (per curiam).[13]

[12] In *Rawlings*, the environment was "[b]y all accounts" congenial, even joking. 448 U.S. at 107-08. Here the atmosphere was by Harris's account extremely coercive, and even by the police account far more coercive than in *Rawlings*.

[13] Although in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court refused to find that a suspect's second confession was tainted by an earlier confession obtained in violation of *Miranda*, the Court distinguished such technical *Miranda* violations at issue in that case from "overtly or inherently coercive [police] methods" that produce a first confession. *Id.* at 312 n.3. *See generally id.* at 311-14. Here, Harris's first confession came immediately after his home had been surrounded and then invaded by police who were deliberately violating *Payton*.

Miranda warnings alone did not purge the taint of the Fourth Amendment violation. *See Lanier* v. *South Carolina*, 474 U.S. 25, 26 (1985) (per curiam); *Taylor* v. *Alabama*, 457 U.S. at 690. This is especially true because *Miranda* warnings do not inform a person of his rights under the Fourth Amendment. *Brown* v. *Illinois*, 422 U.S. at 601 n.6. Admitting Harris's statement merely because he was given *Miranda* warnings "would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the "procedural safeguards" of the Fifth.'" *Dunaway* v. *New York*, 442 U.S. at 219 (quoting Comment, 25 Emory L.J. 227, 238 (1976)).[14] Accordingly, the direct causal connection between the illegality and the statement and the absence of every traditional attenuation factor require suppression.

III. THIS COURT SHOULD NOT DISTURB THE FACTUAL FINDING THAT HARRIS DID NOT CONSENT TO THE WARRANTLESS ENTRY, BECAUSE THAT FINDING IS FULLY SUPPORTED BY THE RECORD.

The New York courts found that respondent did not consent to the police entry into his home. This Court has long held that it will not disturb such factual findings except in "exceptional circumstances," that is, where the findings by the state courts are devoid of factual foundation. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952); *see also United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978) (quoting *Gruver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (following the "two-court rule" and deferring to factual findings absent exceptional circumstances)). As long as evidence exists in the record that supports

[14] Nor is this a case in which good faith or the absence of purposeful or flagrant misconduct might enable *Miranda* warnings to dissipate the taint of the Fourth Amendment violation. *See Dunaway* v. *New York*, 442 U.S. at 226 (Rehnquist, J., dissenting).

the lower courts' factual findings, this Court will not disturb those findings, even if there is contrary evidence in the record. *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. at 160.

The trial court in this case found that Harris had "submitted to [police] authority" (J.A. 19, 20) after being confronted by two officers who were at his door with their guns drawn and another who was on the fire escape outside his window. The intermediate appellate court, which had power to review factual findings made in the trial court, N.Y. Crim. Proc. Law § 470.15(1) (McKinney 1983); *People* v. *Bleakley*, 69 N.Y.2d 490, 493-94, 508 N.E.2d 672, 673-74, 515 N.Y.S.2d 761, 762 (1987), did not disturb the trial court's finding that Harris did not consent to the entry. That finding was binding upon the New York Court of Appeals. N.Y. Crim. Proc. Law § 470.35(1) (McKinney 1983).

The State, of course, has the burden of proving the voluntariness of consent, a burden it did not carry below and cannot meet on the record in this case. *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). That issue is determined by viewing the "totality of all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). Consent is not voluntary where, as here, it is a product of duress or coercion, either express or implied. *Bumper* v. *North Carolina*, 391 U.S. at 548-49.

The determinations below that Harris did not consent to the police entry are fully supported by the record and should not now be revisited. Although it appears that the trial court credited a combination of respondent's and the detectives' descriptions of the entry,[15] under either version Harris did not consent to the police entry into his apartment. By his account, he admitted the police only in response to express coercion, and even in the police version, the after-dark entry was pursuant to implied coercion. (J.A. 11-14, 26)

[15] For example, the trial court described Harris as "having had drinks, according to the officer on his own behest; according to him, at their behest." (J.A. 29)

Harris said that he saw a man with a gun on the fire escape outside his window, heard banging on his door and opened the door only after receiving no response to his asking who was at the door. When he opened the door, "two guys barged into the apartment" with guns trained on him. (J.A. 26) The police testified that one officer was on the fire escape knocking on Harris's window, while two others, guns drawn, knocked on the door. (J.A. 12-14) They also testified that Harris had invited them inside, but the lower courts necessarily either did not credit that testimony or found that the alleged invitation was in response to a display of police authority.[16]

Thus the evidence supports the factual finding that Harris did not consent to the entry by the police. Under any analysis, the record contains contradictory evidence, which does not constitute the exceptional circumstances that would allow disturbing the lower courts' finding that respondent did not consent to the police entry.

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[16] In finding the circumstances coercive, the trial court may also have considered that two court-appointed psychiatrists had found respondent unable to assist in his own defense and had diagnosed him as suffering from paranoid psychosis. (Examination Reports of Dr. Naomi Goldstein, dated August 16, 1984, and Dr. Erica Weinstein, dated August 13, 1984)

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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